Supreme Court, U.S.
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No. 04- 04 86

IN THE

Supreme Court of the United States

BOB GREEN, Harrison County Sheriff,
and
BOBBY WEAVER, Gregg County Sheriff,

Petitioners,

v.

DEAN KINNEY and DAVID HALL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. This case raises important questions concerning the First Amendment and qualified immunity; specifically, the likelihood of clearly established law in *Pickering* balancing.

II. This case raises important questions concerning the scope of 42 U.S.C. § 1985(2) which should be decided by this Court.

III. This Court should also address Petitioners' claim of official immunity under state law, as the clearly established law inquiry is relevant to state law immunity.

LIST OF ALL PARTIES

Petitioners-Defendants:

Bob Green, Harrison County Sheriff
Bobby Weaver, Gregg County Sheriff

Plaintiffs-Respondents:

Dean Kinney
David Hall

Other Defendants:

Harrison County, Texas
Gregg County, Texas
City of Tyler, Texas
W.A. "Bill Young," Tyler Police Chief
East Texas Police Chiefs Association
Charles "Chuck" Williams, Marshall Police Chief
City of Marshall, Texas
Ted Gibson, Nacogdoches Police Chief
City of Nacogdoches, Texas
Ronnie Moore, Kilgore Director of Public Safety
City of Kilgore, Texas
J.B. Smith, Smith County Sheriff
Smith County, Texas

These other Defendants are being served as Respondents.

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Petitioners Bobby Weaver and Bob Green respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 15, 2005.

OPINIONS BELOW

The en banc opinion of the Court of Appeals, review of which is sought by this petition, is reported as *Kinney v. Weaver*, 367 F.3d 337 (2004). It is reprinted in the Appendix of this Petition at pages A1a-A129a (hereinafter "App. A"). Along with the majority opinion, Circuit Judge Barksdale's concurring and dissenting opinion, joined by Circuit Judges Jones, Smith, Garza, and Clement, is reprinted at App. A76a, and Circuit Judge Jones' concurring and dissenting opinion, joined by Circuit Judges Smith, Barksdale, Garza, and Clement, is reprinted at App. A91a. Circuit Judge Jolly's dissenting opinion is reprinted in the Appendix. App. A129a. The court's order granting rehearing, dated July 9, 2003, is reported at *Kinney v. Weaver*, 338 F.3d 432 (5th Cir. 2003), and reprinted at App. B130a. The panel opinion of the Court of Appeals was reported as *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2003), and is reprinted at App. C132a. The panel opinion has since been withdrawn. The opinion of the United States District Court for the Eastern District of Texas is reported as *Kinney v. Weaver*, 111 F. Supp. 2d 831 (E.D. Tex. 2000), and is reprinted in the Appendix. App. D198a.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. § § 1331, 1343, and 1367. Petitioners appealed this case to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. A district court's denial of "qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

On July 31, 2002, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the decision of the district court. App. C132a. The Fifth Circuit subsequently granted en banc rehearing. App. B130a. The en banc appellate court affirmed in part and reversed in part the decision of the district court on April 15, 2004. App. A1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(2):

> (2) Obstructing justice; intimidating party, witness, or juror
>
> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

STATEMENT OF THE CASE

Petitioners Bobby Weaver and Bob Green are the former sheriffs of Gregg County and Harrison County, respectively. They were ultimately responsible for the training of the officers under their command. Both sheriffs routinely sent their officers to the East Texas Police Academy ("ETPA"), a division of Kilgore College, for training. The ETPA provides basic and advanced training for law enforcement officers in East Texas. Neither the sheriffs nor the counties were contractually bound to send officers to the ETPA for training.[1]

Respondents Kinney and Hall were instructors at the ETPA. In August of 1998, Kinney and Hall testified as expert witnesses for the family of Edward Gonzales, a teenager who was fatally shot by a Kerrville, Texas police officer. In the Kerrville case, a suspect had fired forty shots while standing on the Guadalupe River Dam. The defendant police sniper testified that he first told the suspect to drop his rifle, and when the suspect lifted the rifle and pointed it at him, the officer killed the suspect in self-defense. Kinney and Hall testified that the Kerrville police officer had used excessive force and that the Kerrville police department had failed to implement the proper policies necessary to direct the conduct of officers acting as snipers. Both Kinney and Hall were to be paid for their services, but later declined payment.

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1. The facts set forth in this Petition are taken exclusively from the Fifth Circuit opinions. App. A1a-A129a. This is an appeal from the denial of summary judgment, and Petitioners, as they must, for purposes of this appeal only, accept the Plaintiffs' version of the facts, where conflicting.

Following Respondents' testimony in the Kerrville case, various law enforcement officials in East Texas complained to Kilgore College President William Holda and threatened to stop using the ETPA for their officer training. In late September 1998, Police Chiefs for the cities of Tyler and Marshall wrote letters to Holda, complaining of Respondents' testimony against law enforcement in Kerrville. Both letters made it plain that the chiefs did not like Respondents teaching their officers. On September 30, 1998, Holda met with several law enforcement officials, including Petitioner Green, to discuss the complaints against Respondents. The officials communicated to Holda that they wanted Respondents off of the ETPA faculty because their testimony was in conflict with their duties as instructors, and that they would not send officers to ETPA for training if Respondents remained on the faculty. Petitioner Green and others later agreed to send officers to ETPA for training, but not for instruction by Respondents.

On October 22, 1998, the East Texas Police Chiefs Association held its quarterly meeting in Kilgore. Petitioners Green and Weaver attended the meeting. The minutes of that meeting stated, "it was agreed that none of the Chiefs or Sheriffs present would send their officers to any classes taught by either [Respondent]." Members of the East Texas Police Chiefs Association were openly critical of Respondents.

By November 1998, all of Respondents' classes had been cancelled. Respondent Hall resigned in January 1999 because he believed his contract would be cancelled. He returned to the job he had previously held, as a patrol officer for the City of Carrollton. Respondent Kinney remained at Kilgore College through the end of his contract. Kilgore College did not renew his contract as an ETPA instructor, but did offer

him a contract as a lecturer in Kilgore College's Criminal Justice Department, at a reduced salary.

On April 7, 1999, Respondents filed suit in federal district court against several police chiefs and sheriffs, including Petitioners, their respective cities and counties, and the East Texas Police Chiefs Association. Specifically, Respondents alleged that the defendants had blackballed them "in retaliation for their truthful testimony on behalf of the victim of a police shooting," thus alleging violations of: (1) the right to testify freely, 42 U.S.C. § 1985(2); (2) their rights to free speech under the First and Fourteenth Amendments; (3) their right to due process of law under the Fourteenth Amendment; and (4) Texas tort law.

Petitioners (along with other individual defendants) asserted the defenses of qualified immunity from the federal claims and state official immunity from the state law tort claims. Petitioners moved for summary judgment on the merits and on their immunity defenses. Police officials offered evidence of actual and potential disruption to their training programs and departments. Various police officials testified that Respondents' expert testimony hurt the close working relationship required between academy instructors and representatives of the cities and counties, damaged teamwork required among those involved in training officers, threatened the confidentiality of information city and county officers shared with Kinney and Hall about their procedures and practices, undermined feelings of loyalty and confidence, and represented an improper use of the instructors' relationships with ETPA. The district court denied the summary judgment motion in its entirety. App. D198a.

On interlocutory appeal, Petitioners, along with other individual defendants, asked the Fifth Circuit to reverse the district court's denial of immunity. A divided Fifth Circuit panel affirmed the district court's denial of immunity on the § 1985, First Amendment, and state law claims, but reversed the district court's decision on the due process action. App. C132a. Thereafter, Petitioners, again along with other individual defendants, asked the Fifth Circuit to rehear its appeal en banc. The Fifth Circuit granted rehearing and heard oral argument. App. B130a.

A sharply divided en banc Fifth Circuit reached the same result. Nine circuit judges voted to affirm the denial of immunity as to the § 1985, First Amendment, and state law claims, but reverse the district court's decision on the due process action. App. A1a. The six remaining circuit judges wrote three dissenting opinions. As Circuit Judge Barksdale wrote:

> [I]t is simply nothing short of absurd to hold that the police chiefs and sheriffs are not vested with discretion in choosing which teachers to use (and pay) for training the police chiefs and sheriffs' own student-officers – the very persons the police chiefs and sheriffs are responsible for training. This cannot be the law.

App. A76a-77a.

REASONS FOR GRANTING THE PETITION

THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE FIRST AMENDMENT AND QUALIFIED IMMUNITY; SPECIFICALLY, THE LIKELIHOOD OF CLEARLY ESTABLISHED LAW IN *PICKERING* BALANCING.

This Court and the Courts of Appeals are littered with cases in which plaintiffs complain of the failure of local sheriffs to provide training for their officers. Yet, in the instant case, the Fifth Circuit has found that Respondents have alleged a constitutional violation against the Petitioner sheriffs for doing just that — taking an active role in the selection of training for their officers.

While the First Amendment protects all individuals' interests in free speech, government employees or contractors give up a certain amount of protection by virtue of their employment. *Waters v. Churchill*, 551 U.S. 661, 675, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. 551 U.S. at 674-75, 114 S. Ct. at 1888-89. The government cannot restrict the speech of the public at large just in the name of efficiency. *Id.* But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. *Id.*

In considering the relative rights of the government in the efficiency of its operations and those of an employee or contractor, a court must determine, inter alia, whether the public employer's legitimate countervailing government interests

outweigh the value of the employee's or contractor's protected speech. *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 675-76, 116 S. Ct. 2342 2347-48, 135 L. Ed. 2d 843 (1996); *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1689, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968). This balancing inquiry is a question of law. *Brady v. Fort Bend County*, 145 F.3d 691, 708 n.7 (5th Cir. 1998).

Under certain circumstances, a government official is protected by qualified immunity for actions taken against an employee as a result of that employee's speech, even where the actions taken violate the First Amendment. It is, by now, abundantly clear that government officials are immune from liability for civil damages so long as the officials' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). It is also clear that a plaintiff may only defeat qualified immunity by demonstrating that the unlawfulness of the official's conduct was apparent and that all reasonable officials realized the official's conduct violated the constitutional provision sued on. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987); *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997). Immunity is only lost where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). As this Court recently stated, qualified immunity is only defeated where the government official has "fair notice" or "fair warning" that his conduct violates another's constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 739-40, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002). Further, a

defense of qualified immunity is not properly rebutted by evidence that the official's conduct was malicious or otherwise improperly motivated. *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 1592, 140 L. Ed. 2d 759 (1998). Evidence concerning the defendant's subjective intent is irrelevant to the qualified immunity defense. *Id.*

The Fifth Circuit's finding that Respondents' interest in public speech outweighed Petitioners' legitimate governmental interests is erroneous in several regards. First, the majority characterized Respondents' interest in voluntary testimony as "extremely strong" (App. A47a), contrary to other circuit's holdings. *See Worrell v. Henry*, 219 F.3d 1197, 1209 (10th Cir. 2000); *Tedder v. Norman*, 167 F.3d 1213, 1215 (8th Cir. 1999); *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888-89 (3d Cir. 1997). Second, the majority characterized Petitioners' interests as irrelevant or minimal. Petitioners and other police officials believed the expert testimony hurt the close working relationship required between academy instructors and representatives of the cities and counties, damaged teamwork required among those involved in training officers, threatened the confidentiality of information city and county officers shared with Kinney and Hall about their procedures and practices, undermined feelings of loyalty and confidence, and represented an improper use of the instructors' relationships with ETPA. Third, the majority improperly considered evidence (or speculation) about Petitioners' motives (A53a-57a), contrary to *Crawford-El v. Britton*, 523 U.S. 574, 588 , 118 S. Ct. 1584, 1592, 140 L. Ed. 2d 759 (1998). Third, the majority failed to consider the responsibility placed on elected sheriffs in Texas. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 85.003 (a "sheriff is responsible for the official acts of a deputy"); *Thompson v. Upshur County*, 245 F.3d 447, 459

(5th Cir. 2001) (Texas sheriffs are liable for failure to train or supervise officers). Finally, the majority failed to consider that a sheriff is responsible for the safety of his employees, and Respondents' voluntary expert testimony was dangerous to officer safety. Respondents testified that the Kerrville police sniper used excessive force in shooting a suspect who had fired forty shots while standing on the Guadalupe River Dam, been told to drop his rifle, and then lifted the rifle and pointed it at the sniper. The court in the Kerrville case correctly determined that the sniper's conduct was not unconstitutional. If Respondents believed their testimony, they did not have any business teaching student officers.

1. This Court should review its First Amendment balancing test to discuss the fact-specific nature of that test and its concomitant result that the law is rarely "clearly established" in the context of the termination or discipline of a public employee.

Where *Pickering/Connick* balancing is required, the law is rarely "clearly established." This Court noted,

> [b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their supervisors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering, 391 U.S. at 569, 88 S. Ct. at 1735. Seven circuits, including the Fifth Circuit, have agreed that *Pickering/ Connick* balancing is a "fact-sensitive, context-specific" matter, which often precludes a finding that the law was so

clearly established that it put the government official on notice of the unconstitutional nature of his acts. *See* Circuit Judge Jones' Dissent, App. A104a-105a n.47. For example, the Tenth Circuit has held that "where *Pickering* balancing is required, the law is less likely to be well established than in other cases." *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (1991) (en banc). Yet, the Fifth Circuit in the instant case has abandoned its prior reasoning and that of the other seven circuits to find that Petitioners did not enjoy qualified immunity where there was no similar Fifth Circuit precedent, and other circuits on similar facts reached a contrary result. Further, the Fifth Circuit inappropriately considered evidence (or speculation) about Petitioners' motives in arriving at the erroneous *Pickering* balance in this case. A53a-57a.

2. This court should review this case to resolve the conflict in the circuits created by the Fifth Circuit's decision. Suddenly, constitutional conduct in the Third, Eighth, and Tenth Circuits violates the Constitution in the Fifth Circuit.

At least three cases from other circuits support Petitioners' qualified immunity defense. In *Tedder v. Norman*, the Eighth Circuit held that it was not illegal for a police academy to demote its district director once the director "lost faith" in him when, like Kinney and Hall, he testified voluntarily as an expert witness against law enforcement in an excessive force case. 167 F.3d 1213, 1215 (8th Cir. 1999). Similarly, the Third Circuit exonerated a law enforcement agency that demoted one of its officers for voluntarily appearing as a character witness at a bail bond hearing. *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888-89 (3d Cir. 1997). Officer Green left the hearing and declined to testify upon learning the nature of the defendant's charges. The Third

Circuit found that the officer's decision to testify was activity protected by the First Amendment but that the agency's interest outweighed the public's interest in the voluntary testimony. 105 F.3d at 888. Finally, a third case, *Worrell*, held that a district attorney's interest in preventing disruptions with another law-enforcement agency outweighed a public employee's interests in avoiding retaliation for having previously testified as an expert witness against a police officer. *Worrell v. Henry*, 219 F.3d 1197, 1209 (10th Cir. 2000).

The Fifth Circuit's majority opinion does concede that "our past cases do not include one that has specifically addressed retaliation against instructors at a police academy." App. A68a-69a. However, instead of holding that the law was not clearly established, the court conducted a strained analysis of dissimilar cases to hold that the law was clearly established. Of the four cases relied upon by Fifth Circuit's majority, none provided fair notice to Petitioners that their conduct was unlawful.

In *Brawner v. City of Richardson*, for instance, the local newspaper received an anonymous letter from a police sergeant that described a departmental coverup of two incidents involving department officers. 855 F.2d 187, 189 (5th Cir. 1988). Supervisors questioned Brawner about the anonymous letter. Brawner was later suspended for refusing to answer further questions regarding the investigation. 855 F.2d at 190. This case is distinguishable from the present case and does not provide Petitioners with fair notice because: (1) it did not involve witness testimony, whether fact or expert; (2) there was no evidence that Brawner was responsible for training officers or that his speech affected his performance of his job or that of other officers; (3) there was no possible conflict of interest as the goals of the speech

(punishing and deterring crime) were the same as the departmental goals; and (4) the department did not identify any governmental interest that had been impaired.

Similarly, in *Matherne v. Wilson*, a deputy sheriff was fired for campaigning for a sheriff's political opponent in violation of departmental policy. 851 F.2d 752, 755 (5th Cir. 1988). This case is factually distinct from the instant case in that: (1) it did not involve witness testimony, whether fact or expert; (2) there was no evidence that Matherne was responsible for training officers for the department; (3) and there was no evidence that Matherne's decision impaired working relationships in the department or caused strife within the department. 851 F.2d at 761.

The two "witness" cases cited in the Fifth Circuit opinion are also very different from this case. In *Rainey v. Jackson State College*, Rainey, prior to his employment at the college, had testified as an expert for the defense in a criminal case charging that a film was obscene. 481 F.2d 347, 349 (5th Cir. 1973). The college withdrew Rainey's contract because of his testimony at the obscenity trial and the resulting publicity. 481 F.2d at 350. This case does not provide any notice to Petitioners as it did not concern disruption of college functions or take into account unique law enforcement interests. *Reeves v. Claiborne County Board of Educators* is similarly remote. 828 F.2d 1096 (5th Cir. 1987). In *Reeves*, the plaintiff testified as a fact witness in a civil rights trial on behalf of individuals who had alleged they were fired for political activity in the last election. 828 F.2d at 1098. Plaintiff herself later filed suit, saying that she had been reassigned in retaliation for her earlier truthful testimony. Reeves testified as a fact witness under subpoena, not as a voluntary expert witness. There was no evidence that her

testimony disrupted the efficient functioning of her school, and her employment did not involve the special concerns attendant upon law enforcement.

Finally, the decisions relied upon by the Fifth Circuit ignore the heightened interest of law enforcement agencies. *See Shands v. City of Kennett*, 993 F.2d 1337, 1344-45 (8th Cir. 1993); *Worrell*, 219 F.3d at 1208 (these concerns are heightened in smaller offices and departments, where relatively minor disturbances in morale may create significant problems"); *Williams v. Seniff*, 342 F3d 774, 783 (7th Cir. 2001) ("'deference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement'") (quoting *Kokinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999)).

THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE SCOPE OF 42 U.S.C. § 1985(2) WHICH SHOULD BE DECIDED BY THIS COURT.

Petitioners also asserted that they were entitled to qualified immunity from Respondents' section 1985(2) "witness retaliation" claims. Specifically, Petitioners contended that they had not violated the statute and that the statute's prohibitions were not sufficiently clear in 1998 to give them notice that their conduct violated the statute. The Fifth Circuit disagreed, extending section 1985(2) protection to expert witnesses and holding that Petitioners' decision to send students to teachers other than Respondents constituted an injury to Respondents' property. The Fifth Circuit denied Petitioners' qualified immunity on the grounds that expert witnesses had always been protected under section 1985(2) and that this Court has decided that section 1985(2) protects at-will employment from interference.

1. This Court should discuss section 1985(2) to clarify that it was not intended to prevent local law enforcement officials from enrolling their students in classes, based on the instructor's prior expert testimony in federal court.

The Fifth Circuit's expansive reading of section 1985 extends the statute beyond any anticipated scope. It is unclear from the text of section 1985 whether it is meant to extend to expert witnesses at all. The statute provides,

> if two or more persons . . . conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . the party so injured may have an action for the recovery of damages. . . .

42 U.S.C. §§ 1985(2), (3). The statute does not expressly mention "expert" witnesses at all. Further, the only case to consider whether expert testimony falls within the statute's protection was significantly different. In *Chahal*, the Second Circuit held that a party could proceed with its section 1985(2) action where a prospective expert witness withdrew from the case one week prior to trial as a result of intimidation, thus preventing the party from asserting its claim. *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 22-24 (2d Cir. 1984).

The possible results of the Fifth Circuit's holding are mind-boggling. This holding does not merely punish a wrongdoer for intimidating an expert witness and thus,

preventing a party from being able to assert its claim. On the contrary, this holding contemplates punishing a party and counsel for refusing to hire an expert witness on the basis of his prior testimony. Judge Barksdale's dissent identifies the logical result:

> Consider the wide-ranging, truly absurd results arising out of extending § 1985 to cover post-testimony economic injury to expert witnesses of the type claimed here. Arguably, every person who testifies as an expert and is later denied employment could file an action under § 1985 against the would-be employer. For example, assume an urban planner routinely testifies in litigation against cities. Is a city now subject to § 1985(2) liability if it refuses to hire that person if he applies for a job in its planning department?

Kinney, 367 F.3d at 378 (Barksdale, J., dissenting), App. A83a.

2. This Court should determine whether Petitioners' discretionary decision to send their officers to be instructed by persons other than Respondents constituted an "injury to Respondents' property" within the meaning of section 1985(2).

Petitioners did not terminate the at-will employment of Respondents. On the contrary, Respondent Hall resigned from the ETPA to return to the City of Carrollton Police Department. Respondent Kinney was re-assigned as a lecturer in Kilgore College's Criminal Justice Department. Petitioners, as sheriffs, are charged by law with the duty of training their officers. In fact, sheriffs can be liable for injuries resulting from their failure to do so. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 85.003 (a "sheriff is responsible for the official

acts of a deputy"); *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001) (Texas sheriffs are liable for failure to train or supervise officers).

The Fifth Circuit asks too much of a local sheriff by requiring that he adequately train his deputies, making him responsible for the result, but not allowing him discretion in where to send the deputies for training.

3. This Court should consider whether Petitioners were entitled to qualified immunity for their choice in sending their deputies to instructors other than Respondents. In order to defeat qualified immunity, a plaintiff must allege the violation of a clearly established right of which a reasonable officer would have known. In the context of section 1985(2), Respondents have failed to allege a violation and failed to demonstrate that the right was clearly established.

Respondents clearly cannot allege the violation of section 1985(2) because they offered expert testimony and did not suffer an injury in their person or property on account of having so attended or testified. Further, the law as identified by the Fifth Circuit was not clearly established at the time Petitioners chose not to enroll their deputies in Respondents' classes in 1998. Petitioners stopped sending their student-officers to Respondents' classes in October 1998. ETPA, not Petitioners, removed Respondents' courses from the ETPA schedule in November, 1998. This Court did not decide *Haddle v. Garrison* until December of 1998. Prior to the December 1998 *Haddle* decision, there was a conflict of holdings of the First, Ninth, and Eleventh Circuits regarding whether a conspiracy to deprive a person of at-will employment constituted an injury to the person or property

within the meaning of section 1985(2). *Haddle v. Garrison*, 525 U.S. 121, 125, 119 S. Ct. 489, 491, 142 L. Ed. 2d 502 (1998). Accordingly, the law was not clearly established, and Petitioners were entitled to qualified immunity.

THIS COURT SHOULD ALSO ADDRESS PETITIONERS' CLAIM OF OFFICIAL IMMUNITY UNDER STATE LAW, AS THE CLEARLY ESTABLISHED LAW INQUIRY IS RELEVANT TO STATE LAW IMMUNITY.

As government officials, Petitioners are immune from suit for actions done in a good faith performance of discretionary duties within the scope of their authority. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). The test for good faith is whether a reasonably prudent official, under the same or similar circumstances, could have believed his actions were reasonable. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). Thus, whether the law was clearly established at the time of the officers' actions is relevant to the official immunity determination. *Chambers*, 883 S.W.2d at 656. Petitioners are entitled to official immunity because their actions in communicating with President Holda and changing the training of their officers were part of their discretionary duties, within the scope of their authority, and done in good faith.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 15, 2004 REVISED MAY 3, 2004

REVISED MAY 3, 2004
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40557

DEAN KINNEY; DAVID HALL

Plaintiffs-Appellees

v.

BOBBY WEAVER, Etc.; ET AL

Defendants

J B SMITH, Smith County Sheriff; SMITH COUNTY TEXAS; W A "BILL" YOUNG, Tyler Police Chief; CITY OF TYLER, TEXAS; EAST TEXAS POLICE CHIEF'S ASSOCIATION; BOBBY WEAVER, Gregg County Sheriff; BOB GREEN, Harrison County Sheriff; GREGG COUNTY TEXAS; HARRISON COUNTY TEXAS; RONNIE MOORE, Kilgore Director of Public Safety; CHARLES "CHUCK" WILLIAMS, City of Marshall Police Chief; TED GIBSON, Nacogdoches Police Chief; CITY OF KILGORE, TEXAS; CITY OF MARSHALL TEXAS; CITY OF NACOGDOCHES TEXAS

Defendants-Appellants

Appendix A

Appeals from the United States District Court
for the Eastern District of Texas

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, and PRADO, Circuit Judges.*

KING, Chief Judge:

Plaintiffs-Appellees Dean Kinney and David Hall brought suit against seven law enforcement officials, the seven cities or counties that employ these officials, and the East Texas Police Chiefs Association, asserting four claims: (1) a 42 U.S.C. § 1985(2) claim alleging conspiracy against Kinney and Hall because of their testimony in judicial proceedings, (2) a 42 U.S.C. § 1983 claim alleging violations of their rights to freedom of speech under the First Amendment, (3) a § 1983 claim alleging violations of their Fourteenth Amendment rights to due process of law, and (4) a state law claim alleging tortious interference with business relations. The law enforcement officials now bring an interlocutory appeal of the district court's order denying their motion for summary judgment, in which they asserted qualified immunity against the federal claims and state official immunity against the tort claim. A panel of this court affirmed in part and reversed in part. *Kinney v. Weaver,* 301 F.3d 253 (5th Cir. 2002), *vacated and reh'g en banc granted,*

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* Judge Pickering was not a member of the court when this case was submitted to the court en banc and did not participate in the decision.

338 F.3d 432 (5th Cir. 2003). On rehearing en banc, we now AFFIRM the district court's order denying the officials' claim of immunity from the § 1985 claim, the § 1983 First Amendment claim, and the state law claim; given material factual disputes, these claims cannot be disposed of on summary judgment. We REVERSE the district court's order denying immunity from the plaintiffs' § 1983 due process claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

While many of the basic facts in this case are uncontested, a number of the legally relevant facts are still disputed at this stage. In Parts II and III of this opinion, we elaborate the appellate prism through which we must view the facts in this interlocutory appeal from the district court's decision denying qualified immunity. As we explain there, we are required to accept the truth of the plaintiffs' summary judgment evidence, and we lack jurisdiction to review the genuineness of those factual disputes that precluded summary judgment in the district court. Nonetheless, for ease of understanding and later discussion, our recitation of the facts will note both sides' assertions with respect to the material points of disagreement.

At the time of the events giving rise to this case, Kinney and Hall were instructors at the East Texas Police Academy ("ETPA"), a division of Kilgore College in Kilgore, Texas. Founded by the East Texas Police Chiefs Association in 1966, the ETPA provides basic and advanced training for law enforcement officers in the greater East Texas area. Kinney and Hall had been working at the ETPA for seventeen years

and six years, respectively, under renewable one-year employment contracts. The seven law enforcement officials (collectively "the Police Officials") asserting qualified immunity in this case are police chiefs or sheriffs who possess final authority over the training of the officers employed by their respective agencies.[1] Before the fall of 1998, the Police Officials enrolled their officers in ETPA courses on a regular basis, including courses taught by Kinney and Hall. The Police Officials were not contractually bound to continue using either the ETPA's services or the services of Kinney and Hall in particular.

In August 1998, Kinney and Hall testified as expert witnesses for the family of Edward Gonzales, a teenager who was fatally shot by a police sniper employed by the city of Kerrville, Texas. The Kerrville case did not involve officers who had trained at the ETPA or police agencies that sent trainees to the ETPA, as Kerrville lies several hundred miles from Kilgore, outside the region from which the ETPA draws its students.[2] Kinney and Hall had never before testified as expert witnesses against police officers, though Kinney

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1. The Police Officials are: Nacogdoches Police Chief Ted Gibson, Harrison County Sheriff Bob Green, Kilgore Director of Public Safety Ronnie Moore, Smith County Sheriff J.B. Smith, Gregg County Sheriff Bobby Weaver, Marshall Police Chief Charles "Chuck" Williams, and Tyler Police Chief W.A. "Bill" Young.

2. The driving distance between the two cities is approximately 435 miles. As the district court noted by way of comparison, that figure is roughly the same as the driving distance between Boston, Massachusetts, and Washington, D.C. As the crow flies, the distance between Kilgore and Kerrville is 300 miles.

had previously testified as an expert in defense of the police. The lawyer for the victim's family in the Kerrville case approached the two instructors because he had experienced difficulty finding local experts who were willing to testify against the police.

Based on their knowledge and experience as law enforcement instructors specializing in the use of force and firearms, Kinney and Hall testified that the Kerrville police officer had used excessive force and that the Kerrville police department had failed to implement the proper policies necessary to direct the conduct of officers acting as snipers. Kinney and Hall were technically under subpoena in the Kerrville case, but they testified voluntarily. Although Kinney and Hall originally planned to receive payment for their services, they decided, shortly after their depositions and before trial, that they would decline payment. Kinney's explanation for this decision, confirmed by Hall, is that the two "felt so strongly about the incident and what had happened to Eddie Gonzales" that they concluded that "it wouldn't be right to charge."

Soon after Kinney and Hall testified in the Kerrville case, William Holda, the president of Kilgore College, received letters from some of the Police Officials threatening to stop using the ETPA for officer training. In a letter dated September 15, 1998, Kilgore Director of Public Safety Ronnie Moore told Holda that he was concerned about the instructors' recent inquiries regarding a gun confiscated by the Kilgore police, because "[i]t is a well known fact within this agency that these instructors had previously testified in

another matter, against other Officers."[3] Moore said that testimony offered in support of the police was "acceptable and reasonable," but Kinney's and Hall's testimony "is in direct conflict with the basic fundamentals and expectations that we have come to enjoy from Academy instructors." Moore informed Holda that "[d]ue to these circumstances, our agency will be exploring other options to provide the professional training necessary for our Officers."

In a letter dated September 29, 1998, Charles Williams, the chief of the city of Marshall's police department, also complained to Holda about the instructors' expert testimony. He wrote, "I think it is deplorable . . . that instructors for our Police Academy hire themselves out as an expert witness: AGAINST law enforcement agencies." Williams stated further that "[t]he Marshall Police Department will not attend any courses taught by Mr. David Hall or Mr. Dean Kinney

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3. Kinney and Hall offered an innocent explanation for their inquiries about the seized gun, saying that they hoped to shoot the gun for their own enjoyment and edification—as local police had let them do on other occasions—not because they were gathering information in order to testify as expert witnesses in defense of the gun's owner. The defendants' briefs have highlighted the gun incident, but the plaintiffs' evidence suggests that it was not a motivating factor in the boycott. As described below, the other Police Officials who wrote to Holda did not mention the gun incident; Kinney's and Hall's Kerrville testimony was the only stated reason for threatening to boycott the ETPA. The Kerrville testimony was, moreover, the only complaint reflected in the minutes of the meeting at which the local police agencies decided to boycott the plaintiffs. The district court found that there was sufficient evidence for a jury to conclude that the plaintiffs' testimony was the reason for the boycott. *Kinney v. Weaver,* 111 F.Supp.2d 831, 838 (E.D. Tex. 2000).

due to the liability they place on this Police Department." Williams attached three newspaper articles that mentioned Kinney's and Hall's roles as expert witnesses for the plaintiffs in the Kerrville case.

The summary judgment evidence submitted by Kinney and Hall includes Williams's deposition, in which he testified that he learned of Kinney's and Hall's involvement in the Kerrville case when he received, probably in August 1998, an anonymous package containing the three newspaper articles that he attached to his letter to Holda. In addition to the articles, the package contained a note telling Williams to contact Moore for more information, which Williams did shortly after receiving the package.

Williams forwarded copies of his September 29, 1998, letter and the attached articles to Moore and four of the other Police Officials, namely, Bill Young, the chief of police for the city of Tyler; Bob Green, the sheriff of Harrison County; Bobby Weaver, the sheriff of Gregg County; and J.B. Smith, the sheriff of Smith County. The set of documents that Williams forwarded to Young, which is in the summary judgment record, also included a copy of Moore's September 15 letter to Holda.

Young sent a letter to Holda on September 30, 1998, the day after he received the letters and articles from Williams. Young wrote that he was "greatly disturbed by the recent news that [Hall and Kinney] have acted in the capacity of 'Expert Witnesses' to testify against another law enforcement agency and it's [sic] officers." He emphasized he was writing "not only as Chief of Police of an agency that is one of your

largest customers, but also as President of the East Texas Police Chief's [sic] Association." Noting that "[i]t is not our preference to have these two instructors teach our officers and also engage in legal combat with them in the judicial system," Young stated that "[t]his matter will force us to consider alternative methods to achieve our training needs if not resolved as soon as possible."

In an attempt to address the defendants' complaints, Holda met with Moore, Williams, and Young on September 30, 1998. Also in attendance were three other law enforcement officers to whom Williams had forwarded copies of his letter to Holda, including Defendant Green. In his affidavit, Holda gave an account of this meeting that was largely confirmed by Moore, Williams, Young, and Green in their depositions. According to Holda, all four men "made it clear" (1) that "they wanted Mr. Hall and Mr. Kinney removed from the [ETPA] faculty because their testimony in the Kerrville trial created a conflict of interest with their [ETPA] responsibilities" and (2) "that they would no longer send officers and recruits to the [ETPA] for training if Mr. Hall and Mr. Kinney remained on the Academy faculty."

Defendants Moore, Williams, and Green later agreed to send students to the ETPA on the condition that their officers not be instructed by Kinney and Hall, but Holda's affidavit reports that Young continued to insist that Kinney and Hall also be removed from the ETPA faculty completely. According to Holda, "the stated reason for [the attendees'] refusals to send their officers and recruits for training by Mr. Hall and Mr. Kinney was that their testimony in the Kerrville trial criticized the law enforcement officer on trial."

Testifying in Kerrville had, in the view of the defendants, "created a conflict of interest between [the plaintiffs] and law enforcement officers and the law enforcement community."

The defendants repeatedly expressed a concern that Kinney's and Hall's testimony created "conflicts of interest" and violated principles of "cooperative responsibility," but their letters and affidavits do not elaborate upon the import of those phrases. In their depositions, some of the Police Officials admitted that, in their view, an unacceptable conflict of interest exists whenever a police instructor testifies against a police officer, regardless of location and regardless of whether the instructor had trained the officer. Such a conflict does not exist, in their view, when an instructor testifies for police officers.

Shortly after the September 30 meeting, Holda met with Kinney and Hall to apprise them of the situation. Kinney and Hall assured Holda that they would never testify as experts against any officer who had been trained at the ETPA or any agency that had sent officers to the ETPA for training.[4]

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4. The defendants have suggested that Kinney and Hall told their students that the students might someday face Kinney and Hall in court. In their affidavits and depositions, Kinney and Hall concede that, if subpoenaed to testify against one of their students, they would testify truthfully as to what they taught the student; Kinney and Hall also state, however, that they do not tell their students that they would testify against them as experts. Regarding the defendants' assertion that Kinney once said in class that he would "go to the highest bidder" and could face the students as an expert witness, Kinney responds

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Kinney further promised that he would not accept payment for any future work on behalf of plaintiffs in police misconduct cases. In a letter dated October 5, 1998, Holda conveyed Kinney's and Hall's assurances to the attendees of the September 30 meeting and invited them to attend another meeting along with other East Texas law enforcement officials for the purpose of discussing their concerns directly with Kinney and Hall. None of the invitees indicated an interest in such a meeting or came to the ETPA on the date suggested by Holda. Hall states in his affidavit that one of the defendants told him, on October 13, that the instructors had committed a "sin" for which they could get no forgiveness.

On October 22, 1998, the East Texas Police Chiefs Association held its quarterly meeting in Kilgore. The attendance was unusually large. All of the Police Officials were present, except for Smith, who later spoke to a deputy who had attended the meeting. The minutes of this meeting reflect that Kinney's and Hall's involvement in the Kerrville case was prominent on the agenda. Defendants Young (who was president of the East Texas Police Chiefs Association at the time), Williams, Moore, Gibson, and Weaver voiced their disapproval of Kinney's and Hall's work on behalf of the plaintiffs in the Kerrville case, and all five officials stated their intention to ensure that Kinney and Hall did not train

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that he might have made such a remark as a obvious joke. The students apparently took the comment that way, as the only piece of evidence relating to a student's reaction to the comment says that "I never gave much thought to what he said and believed in my mind that he was just talking."

their officers. Subsequently, the minutes state that "it was agreed that none of the Chiefs or Sheriffs present would send their officers to any classes taught by either [Kinney or Hall]." The minutes do not reflect discussion of any other complaints concerning Kinney and Hall, nor do they reflect any mention of the substance of the instructors' testimony in Kerrville. Some of the defendants admitted in their depositions that they did not know what Kinney and Hall had said in the Kerrville trial, only that they had testified against the police.

Several local media organizations reported on the controversy that had arisen between the ETPA and some of the area police agencies. On television and in print, several defendants are documented announcing their intention either to use a training institution other than the ETPA or to bar their officers from taking Kinney's and Hall's courses. Smith was quoted as stating that Kinney and Hall had "prostituted themselves" by testifying against another officer. Young was shown on television stating that he would not send officers to the ETPA until Kinney and Hall were reassigned or fired. A newspaper article quoted Holda as saying that Young was "asking me to do something he wouldn't do." According to Holda, the instructors had received excellent evaluations and their testimony was "freedom of speech." Weaver told a television reporter that Kinney and Hall had violated "an unwritten code."[5]

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5. The defendants admitted (either in their pleadings, depositions, or during the hearing in the district court) to making the media-reported statements recounted in this paragraph, and the defendants' admissions are proper summary judgment evidence. The record also contains a great many other newspaper clippings

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The Police Officials followed through on their threats both by cancelling enrollments in the plaintiffs' classes and by barring their officers from enrolling in the plaintiffs' courses in the future. The summary judgment evidence indicates that this boycott was quite effective. Holda stated that Kinney's and Hall's courses "were boycotted by a sufficient number of law enforcement agencies so that enrollment was insufficient to make their classes and, therefore, could not be economically continued." The boycott began in October 1998, and by November 10, 1998, all of Kinney's and Hall's basic classes had been dropped from the ETPA schedule, and many of their off-campus classes had been cancelled.

Aware that the enrollment in his courses was down and concerned that he would not be able to withstand a cut in pay, Hall resigned from the ETPA effective January 3, 1999, because he anticipated that his ETPA contract would not be renewed. He was hired as a patrol officer at the Carrollton Police Department, the job he had left to work at the ETPA six years earlier.

Kinney's ETPA teaching contract extended through the 1998-1999 academic year, and he continued to teach during that time. The boycott remained in effect, however, and the ETPA provided alternate instructors for all of Kinney's classes to ensure that the law enforcement agencies that

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quoting both Holda and the defendants; those reports are relevant, without regard to the truth of the matter asserted, to the defendants' argument that the plaintiffs' testimony created a public rift between the ETPA and the local police agencies.

refused to enroll their officers in Kinney's courses could still send trainees to the ETPA. Kinney stated in his affidavit that he "had minimal class time during the first few months of the 1999 calendar year"—specifically, he "had no time in the basic police academy and very little in the in-service classes." In their depositions taken in August 1999, the Police Officials stated that they continued to prohibit enrollment either in Kinney's courses or in all ETPA courses because Kinney remained on the ETPA faculty.

Kilgore College did not renew Kinney's 1998-1999 contract for his position as an ETPA instructor, but rather offered him a contract as a lecturer in the Criminal Justice Department of Kilgore College for the following academic year. The salary for this position was $15,000 less than Kinney earned as an ETPA instructor. He had not taught in the Criminal Justice Department previously, but rather had been an ETPA instructor for the entire seventeen-year period that he had been working for Kilgore College. According to Holda, "Kilgore College did not anticipate a change in the teaching assignment for either Mr. Kinney or Mr. Hall prior to the decisions by certain law enforcement agencies to boycott classes taught by Mr. Hall and Mr. Kinney."

On April 7, 1999, Kinney and Hall filed a complaint in federal district court against the seven Police Officials, their respective cities or counties of employment, and the East Texas Police Chiefs Association, alleging that the defendants had "blackballed" Kinney and Hall "in retaliation for their truthful testimony on behalf of the victim of a police

shooting."[6] Kinney and Hall claimed violations of: (1) their rights to testify freely under 42 U.S.C. § 1985(2), (2) their rights to free speech under the First and Fourteenth Amendments, (3) their rights to due process of law under the Fourteenth Amendment, and (4) Texas tort law. The defendants (both the Police Officials and the entities) moved for summary judgment on the merits of all four claims, and the Police Officials also asserted qualified immunity from the plaintiffs' federal claims and state official immunity from the state tort claim. The district court denied the defendants' motion for summary judgment on all grounds. *Kinney,* 111 F. Supp. 2d at 845.

The Police Officials brought an interlocutory appeal of the district court's order denying summary judgment on their immunity defenses. A divided panel of this court affirmed the district court's order denying immunity with respect to the plaintiffs' claims under § 1985, the First Amendment, and state law, but we reversed the district court with respect to the due process claim. *Kinney,* 301 F.3d at 286. The en banc court granted rehearing in an order dated July 9, 2003, 338 F.3d 432 (5th Cir.2003), and we heard oral argument on September 25, 2003.

II. JURISDICTION

We must first address our jurisdiction to hear this appeal. This court has jurisdiction over appeals of "final decisions"

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6. The suit originally named an eighth police chief and his agency of employment as additional defendants, but the district court granted an agreed motion to dismiss the claims against those parties.

of the district courts. *See* 28 U.S.C. § 1291 (2000). Although a denial of a defendant's motion for summary judgment is ordinarily not immediately appealable, the Supreme Court has held that the denial of a motion for summary judgment based upon qualified immunity is a collateral order capable of immediate review. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985).[7] Our jurisdiction is significantly limited, however, for it extends to such appeals only "to the extent that [the denial of summary judgment] turns on an issue of law." *Id.*

As will be explained in greater detail below, officials enjoy qualified immunity to the extent that their conduct is objectively reasonable in light of clearly established law. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Whenever the district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly. First, the district court decides that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law. Second, the court decides that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct. According to the Supreme Court, as well as our own precedents, we lack jurisdiction to review conclusions of the *second* type on interlocutory appeal. *See Johnson v. Jones,* 515 U.S. 304, 313, 319-20 (1995); *Lemoine v. New Horizons Ranch & Ctr., Inc.,* 174 F.3d 629,

7. This court has held that orders denying official immunity under Texas law are immediately appealable to the same extent as denials of qualified immunity under federal law. *See Cantu v. Rocha,* 77 F.3d 795, 803-04 (5th Cir.1996).

634 (5th Cir. 1999).[8] Stated differently, in an interlocutory appeal we cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true.[9]

We do, however, have jurisdiction to the review the *first* type of determination, the purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law. *See Behrens v. Pelletier,* 516 U.S. 299, 312-13 (1996) (stating that *Johnson* permits a defendant official "to claim on appeal that all of the conduct

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8. Since we lack jurisdiction to review a denial of summary judgment based on the district court's conclusion that fact questions exist regarding whether the defendants engaged in conduct that would violate clearly established law, officials may sometimes be required to proceed to trial even though the ultimate resolution of those factual disputes may show that they are entitled to qualified immunity from liability. The Supreme Court recognizes that this "threatens to undercut" the policy of affording immunity from trial, but the Court has said that "countervailing considerations" nonetheless support this limitation on interlocutory jurisdiction. *See Johnson,* 515 U.S. at 317-18.

9. The *Johnson* Court provided three reasons for its conclusion that arguments relating to the sufficiency of the evidence are not immediately appealable: (1) *Mitchell* had said that interlocutory appeal was appropriate only for reviewing the district court's purely legal rulings, (2) questions regarding sufficiency of the evidence are not "separable" from the underlying merits of the case for purposes of the collateral order doctrine, and (3) reviewing factual disputes on interlocutory appeal was undesirable as a matter of judicial administration. *See Johnson,* 515 U.S. at 313-17.

which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness'"). That is, we have jurisdiction only to decide whether the district court erred in concluding as a matter of law that officials are not entitled to qualified immunity on a given set of facts. As one of our cases succinctly puts it, "we can review the *materiality* of any factual disputes, but not their *genuineness*." *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000).

Given the above, the plaintiffs' suggestion before the panel that we lack jurisdiction over this appeal is incorrect. We do have jurisdiction, but only to the extent that the appeal concerns the purely legal question whether the defendants are entitled to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record. *See Behrens*, 516 U.S. at 312-13.[10]

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10. Although the briefs submitted by both parties in this case address only the issue whether the district court properly denied the Police Officials' claims of qualified immunity, the notices of appeal filed with this court name not only the Police Officials, but also the cities, counties, and the East Texas Police Chiefs Association. The doctrine of qualified immunity applies only to government officials, and thus the portion of the motion for summary judgment addressing the plaintiffs' claims against the cities, counties, and the East Texas Police Chiefs Association attacked those claims on grounds apart from qualified immunity. Because the district court's order denying summary judgment to the entities is not a final decision within the meaning of § 1291, we do not have jurisdiction over an appeal of such an order. Accordingly, we dismiss the appeal of the district court's summary judgment order brought by the cities, counties, and the East Texas Police Chiefs Association.

III. STANDARD OF REVIEW

The standard of review that we apply in an interlocutory appeal asserting qualified immunity differs from the standard employed in most appeals of summary judgment rulings. Ordinarily, we would review the district court's denial of summary judgment *de novo,* applying *the same standard* as the district court. *See Vela v. City of Houston,* 276 F.3d 659, 666 (5th Cir. 2001). The district court, of course, applies the standard of Rule 56, according to which summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On appeal, we would ordinarily apply that same Rule 56 standard, and we would reverse the district court's denial of summary judgment if we concluded that the district court found a genuine factual dispute when, on our own review of the record, no such genuine dispute exists. But, as explained above, in an interlocutory appeal we lack the power to review the district court's decision that a genuine factual dispute exists. Therefore, we do not apply the standard of Rule 56 but instead consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment. *See Behrens,* 516 U.S. at 313; *Jones,* 515 U.S. at 313.

Where factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the plaintiffs' version of the facts as true. *Wagner,* 227 F.3d at 320 ("Even where, as here, the district court has determined that there are genuine disputes raised by the evidence, we assume plaintiff's version of the facts is true. . . ."); *see also Gonzales v. Dallas*

County, 249 F.3d 406, 411 (5th Cir.2001) ("[O]n interlocutory appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal.").[11] When the district court fails to set forth the factual disputes that preclude granting summary judgment, we may be required to review the record in order "to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Johnson*, 515 U.S. at 319. In this case, however, the district court wrote a detailed opinion that carefully identified those factual disputes that prevented summary judgment.[12] In so doing, the district court also assessed the factual import of the plaintiffs' summary judgment evidence. Given the nature of our jurisdiction over an interlocutory appeal asserting qualified immunity, these factual disputes, together with the district court's concomitant assessment of what facts are supported by the plaintiffs' summary judgment evidence,

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11. The defendants recognize this point and conceded in their reply brief before the panel that they must "accept the material facts reasonably suggested by Kinney's and Hall's summary-judgment proof."

12. To be sure, the district court's opinion did not (and could not be expected to) discuss every aspect of the conflicting evidence. The Police Officials' briefs have, at times, discussed aspects of the facts that the district court did not explicitly address. In responding to those arguments, we do not, as the dissent alleges "freely evaluate[] the disputed evidence," Jones dissent at 383. We do not purport to resolve any factual disputes, as this case is at the summary judgment stage. Rather, we seek only to "determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed," for purposes of summary judgment. *See Johnson*, 515 U.S. at 319.

necessarily play a critical role in our decision. We therefore set them forth at length:

> The plaintiffs contend that the record reflects that the defendants "blackballed" or boycotted the plaintiffs' classes at the Academy because the plaintiffs broke the "code of silence." . . .
>
> The defendants, on the other hand, have maintained that they refused to send their officers to classes taught by Kinney and Hall because of potential conflicts of interests. . . .
>
> . . . The record is full of evidence, both circumstantial and direct, backing each of the respective party's positions. After reviewing the record and the arguments of the parties, the court concludes that summary judgment is not appropriate and this case may proceed to trial.

Kinney, 111 F. Supp. 2d at 835.

> There is ample evidence currently in the record for a jury to conclude that the defendants' actions were intended to suppress the plaintiffs' rights to free speech.

Id. at 839.

> There is ample evidence in the record for a jury to conclude that the defendants conspired to deter the plaintiffs from testifying in court by boycotting their business.

Id. at 840.

> There are genuine issues of fact remaining in this case as to whether the plaintiffs' expert testimony could legitimately cause any disruptions in the defendants' operations. Moreover, it must be determined whether these disruptions, if any, were the result of a perceived "conflict of interest" or the "blackballing" of plaintiffs for turning against one of their own.

Id. at 843.

> Plaintiffs' evidence reflects a dogged determination by the defendants to rid Kilgore College of the plaintiffs as instructors in retaliation for speaking out about excessive force by police officers. The court concludes that the acts alleged in the complaint and found in the record, if proven at trial, would violate "clearly established" law.

Id. at 845.

In reviewing the district court's conclusions concerning the legal consequences—the materiality—of the facts, our review is of course *de novo*. *See Lemoine,* 174 F.3d at 634.

Appendix A

IV. QUALIFIED IMMUNITY

The doctrine of qualified immunity seeks to strike a balance between competing social objectives, providing breathing space for the "vigorous exercise of official authority" while at the same time allowing a possibility of redress for victims of officials' abuses. *See Butz v. Economou,* 438 U.S. 478, 504- 06 (1978). Therefore, as against claims under federal law,[13] "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818. The Supreme Court noted in *Harlow* that in most cases, the "of which a reasonable person would have known" language in the qualified immunity standard does not add anything to the "clearly established law" requirement because "a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19. Not long after *Harlow,* the Court refined the qualified immunity standard by defining "clearly established" in a way that encompasses the "objective reasonableness" inquiry: To be "clearly established" for purposes of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Thus, as this court has recognized, in light of the *Anderson* definition

13. With respect to the plaintiffs' state law claim, we must apply the Texas law of official immunity, which differs slightly from the federal standard. Since we reinstate the portion of the panel opinion that dealt with the state law claim, we do not discuss official immunity under Texas law in today's opinion.

of "clearly established," the question "whether the . . . right was clearly established at the time the defendant acted . . . requires an assessment of whether the official's conduct would have been objectively reasonable at the time of the incident." *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 340 (5th Cir.2001).

The Supreme Court has recently provided us with additional guidance regarding the nature of "clearly established" law. It had already been known since *Anderson* that the "clearly established" standard does not mean that officials' conduct is protected by qualified immunity unless "the very action in question has previously been held unlawful." 483 U.S. at 640. In the Court's latest pronouncement on the subject, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), the Court held that one of our sister circuits had erred in defining clearly established law in such a way that qualified immunity was mandated unless the facts of past cases were "materially similar" to the conduct then being challenged. The requirement of "materially similar" facts, the Court determined, was "not consistent with our cases." *Id.*

Yet, at the same time, an official does not lose qualified immunity merely because a certain right is clearly established in the abstract. It is clearly established that the government may not deny due process or inflict cruel and unusual punishments, for example, but those abstract rules give officials little practical guidance as to the legality of particular conduct. Qualified immunity should not be denied unless the law is clear in the more particularized sense that reasonable officials should be "on notice that their conduct

is unlawful." *Saucier v. Katz,* 533 U.S. 194, 206 (2001). The central concept is that of "fair warning": The law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope,* 536 U.S. at 740 (internal quotation marks omitted).

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Therefore, before engaging in the inquiry into whether the official unreasonably violated clearly established law, we should first determine whether the challenged conduct, viewed in the light most favorable to the plaintiff, would actually amount to a violation of federal law in the first place. *Saucier,* 533 U.S. at 201. In conducting this initial inquiry, we employ currently applicable constitutional standards. *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam).

V. CLAIM UNDER 42 U.S.C. § 1985

Section 1985 provides, in relevant part:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from

> testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . .
>
> (3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985 (2000).

According to Kinney and Hall, the Police Officials violated the statute by conspiring to mount a campaign of economic retaliation—which took the form of boycotting Kinney's and Hall's classes and attempting to have them terminated— on account of the instructors' testimony against a police officer in the Kerrville case. The district court denied the defendants' motion for summary judgment, finding that the plaintiffs had produced sufficient evidence of an illegal conspiracy and that the plaintiffs' rights under § 1985 were clearly established at the time. *Kinney,* 111 F. Supp. 2d at 840.

Appendix A

Much of the argument in the district court concerned the issue of whether the plaintiffs adduced sufficient evidence of a conspiracy. The district court's determination that there was sufficient evidence of a conspiracy is not at issue in this interlocutory appeal. Instead, the Police Officials' main argument on appeal has been the legal argument that § 1985 offers no protection to expert witnesses, but instead reaches only fact witnesses. This argument faces an immediate textual impediment, inasmuch as the statute says "*any* party or witness." Nonetheless, the defendants would draw a distinction between the two kinds of witnesses based upon the assertion that expert testimony, unlike fact testimony, is "readily accessible" and can easily be replaced with the testimony of another expert. Expert witnesses, in the defendants' view, therefore need less protection from intimidation. The Police Officials contend, moreover, that the enacting Congress could not have meant to protect expert witnesses because the practice of calling expert witnesses did not exist at the time that § 1985 was enacted, in the aftermath of the Civil War.

Based upon the statute's plain language, we have little difficulty in concluding that "any party or witness" includes expert witnesses. Since the language is clear on this point, there is little room for the defendants' extra-textual arguments for excluding experts. In any case, to the extent that their arguments are relevant, they fail to persuade. The defendants are simply incorrect when they claim that the enacting Congress could not have been familiar with expert witnesses. Expert witnesses have been known for hundreds of years. *See* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony,* 15 HARV. L. REV. 40, 45-50

(1901). Leaving that to one side, the defendants are also incorrect in assuming that the statute's reach is restricted to those factual scenarios that the enacting legislature could have specifically contemplated. On the contrary, the Supreme Court has instructed that Reconstruction-era civil rights statutes are to be given "'a sweep as broad as [their] language,'" *Griffin v. Breckenridge,* 403 U.S. 88, 97 (1971) (alteration in original) (quoting *United States v. Price,* 383 U.S. 787, 801 (1966)), ensuring that their protections remain relevant to modern circumstances.[14]

In answer to the defendants' argument that expert testimony is easily replaceable and therefore less worthy of protection than fact testimony, we would point out that expert testimony on police procedures will not be "readily accessible" if, as happened here, police officials can prevent the persons with the relevant expertise from testifying, even in cases hundreds of miles away.[15] This court's cases involving Sixth Amendment claims of witness intimidation have not suggested that experts need less protection than fact witnesses. *See, e.g., United States v. Bieganowski,* 313 F.3d

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14. In calling for a narrow construction of § 1985(2) that departs from the text, Judge Barksdale's dissent cites *Kush v. Rutledge,* 460 U.S. 719 (1988). But *Kush* is notable because it *rejected* a non-textual limiting construction that certain circuits, including this one, had erroneously embraced. *Id.* at 723, 726.

15. As described earlier, the defendants' position is that no testimony against the police is too distant to warrant condemnation. The plaintiffs in the Kerrville case sought help from Kinney and Hall because they had experienced difficulty finding an expert from their local area.

264, 291 (5th Cir. 2002); *United States v. Dupre,* 117 F.3d 810, 822-23 (5th Cir. 1997). In any case, the defendants' unsupported conjectures about experts' relative "need" for protection cannot displace the text's plain words: "any party or witness." We therefore hold that § 1985(2) protects expert witnesses.

We further conclude that the statute's coverage of expert witnesses was "clearly established" for purposes of qualified immunity. No reasonable official would find the terms "any . . . witness" ambiguous on this point. Although a body of cases is typically required in order to give clear shape to vague constitutional provisions referring to "due process of law" or "cruel and unusual punishments," we believe that the text is itself sufficient to put reasonable officials on notice that the word "witness" includes expert witnesses.[16] No case of which we are aware has even remotely suggested that § 1985(2) does not apply to experts. On the contrary, the only case addressing the issue treats it as obvious that the statute encompasses experts. *See Chahal v. Paine Webber Inc.,* 725 F.2d 20 (2d Cir. 1984). Given the clarity of the

16. We find untenable any general proposition that cases are necessarily required in order to create clearly established law. As the Supreme Court explained in a case involving the criminal counterpart to § 1985, the civil doctrine of qualified immunity has "the same objective" as the rule that due process requires "fair warning" before criminal liability may be imposed. *See United States v. Lanier,* 520 U.S. 259, 270-71 (1997). "[T]he touchstone is whether the statute, *either standing alone or as construed,* made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267 (emphasis added). We doubt that the Police Officials would be willing to agree that the contents of the Texas Penal Code or Title 18 of the U.S. Code are inherently incapable of giving notice of their own meaning, even as to phrases as transparent as "any . . . witness."

phrase "any . . . witness," the absence of more cases like *Chahal* is hardly surprising. Nor would an official find a basis for excluding experts if he or she happened to be familiar with the law in related contexts. As we have just mentioned, no distinction between fact witnesses and expert witnesses exists in our Sixth Amendment witness intimidation cases, nor is any such distinction drawn in cases involving the absolute immunity that protects witnesses from civil liability arising from their testimony.[17]

The defendants make a more plausible argument when they assert that their conduct did not "injure" Kinney and Hall in their "person[s] or property" within the meaning of the statute. Pointing out that they were not contractually obligated to continue sending their officers to the ETPA or to any particular instructor for training, the Police Officials argue that Kinney and Hall lacked a property interest in the Police Officials' enrollment of their officers in Kinney's and Hall's courses. The Police Officials further contend that Kinney and Hall were at-will employees of the ETPA; thus, under precedents interpreting the Due Process Clause, the instructors lacked any property interest in continued employment at the ETPA.[18] Consequently, the Police Officials

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17. *See Briscoe v. LaHue*, 460 U.S. 325, 341-42 (1983); *Storck v. Suffolk County Dep't of Soc. Servs.*, 62 F. Supp. 2d 927, 945 (E.D.N.Y.1999) ("[The absolute] immunity extends to all persons, whether governmental, expert, or lay witnesses, integral to the trial process.") (citing *Briscoe*).

18. Kinney and Hall had contracts for the 1998-1999 academic year, so they were not at-will employees for that term. The relationship was at-will in the sense that Kinney and Hall had no contract for continued employment beyond the contract period, i.e., no right to automatic renewal.

argue, it would have been reasonable for them to believe that their conduct did not "injure [a] witness in his person or property" for purposes of the statute.

Regarding the question whether the plaintiffs have set forth a violation of the statute under current law, the Police Officials' argument is foreclosed by *Haddle v. Garrison*, 525 U.S. 121 (1998), in which the Supreme Court held that "third-party interference with at-will employment relationships[] states a claim for relief under § 1985(2)." *Id.* at 126. In *Haddle*, the Court reasoned that because "[t]he gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings," the loss of at-will employment can injure a plaintiff for purposes of the statute even though he or she lacks a property interest for purposes of the Due Process Clause. *Id.* at 125-26. The Police Officials certainly interfered with Kinney's and Hall's employment within the meaning of *Haddle*. Not only did they avowedly act in concert to pull their students from the plaintiffs' classes, but, according to the district court, they also tried to have the plaintiffs fired from their jobs. *See Kinney*, 111 F. Supp. 2d at 845 (referring to evidence of "a dogged determination by the defendants to rid Kilgore College of the plaintiffs"); *see also supra* at pp. 8, 12 (recounting the Police Officials' demands that Kinney and Hall be fired). The plaintiffs suffered economic injury as a result of the defendants' actions: Kinney's ETPA contract was not renewed, and Hall left the ETPA in apprehension of suffering the same fate. Holda's affidavit confirms that, before the defendants began their campaign, the ETPA anticipated renewing the plaintiffs'

contracts. Coercing an employer into firing an employee is the classic case of interfering with employment relations.[19]

Although a precedent so commanding as *Haddle* is not necessary to establish that a reasonably competent official would have understood that certain conduct was unlawful, we agree with the Police Officials that it was not clearly established before *Haddle* that the "property" contemplated by § 1985(2) included at-will employment. The Supreme Court granted certiorari in *Haddle* to resolve a split among the circuits with regard to the status of at-will employment, 525 U.S. at 124, and this circuit had not clearly announced its view on the subject. Thus, given the absence of a definitive judicial interpretation of "property" for purposes of § 1985(2), coupled with the fact that at-will employment is not "property" for purposes of the Due Process Clause, we cannot conclude that § 1985(2) by its terms clearly established that third-party interference with at-will employment was injury to property. On this point, the law became clearly established only after *Haddle*.[20]

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19. Given the facts of this case, it is incorrect to say, as Judge Barksdale's dissent repeatedly does, that the only thing that the Police Officials did was to benignly decline to enroll their officers in the plaintiffs' classes. The defendants interfered with the plaintiffs' employment, and if that is an absurd result, then the dissent's quarrel is with *Haddle,* not with us.

20. Hall left the ETPA before the expiration of his contract for the 1998-1999 academic year, assertedly because of fears over job security. To the extent that the Police Officials interfered with Hall's rights under this contract, as opposed to Hall's prospects of continued

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Appendix A

The Police Officials and Judge Barksdale argue that *Haddle* is irrelevant to this case because it was issued on December 14, 1998, after the events of September and October 1998, when the conspiracy began. They are mistaken in believing that the conduct that forms the basis of the plaintiffs' statutory claim took place solely in or before October 1998. Subsection 1985(3)'s cause of action specifically extends liability to any persons who "do, or cause to be done, *any act in furtherance* of the object of [a] conspiracy [to injure a witness in retaliation for his or her testimony]." (emphasis added).[21] Kinney and Hall provided

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employment beyond the contract, the Police Officials did more than merely interfere with *at-will* employment. However, the plaintiffs have not argued that the defendants' interference with Hall's contract violated law that was clearly established even before *Haddle,* and thus we need not decide that question.

21. In their petition for rehearing, the defendants raised for the first time an argument that the plaintiffs do not have statutory standing to sue under § 1985(3). The argument is that even though § 1985(2) prohibits the intimidation of "part[ies] or witness[es]" (as well as many other categories of persons), the remedy described in the last clause of § 1985(3) uses the phrase "party so injured" to mean "litigant so injured" rather than "person so injured." There is a split of authority with respect to the point raised by the defendants. *Compare Chavis v. Clayton County Sch. Dist.,* 300 F.3d 1288, 1292 (11th Cir. 2002), *Heffernan v. Hunter,* 189 F.3d 405, 409-10 (3d Cir. 1999), *and Brever v. Rockwell Int'l Corp.,* 40 F.3d 1119, 1125 n.7 (10th Cir.1994) (all holding that non-party witnesses have standing), *with Blankenship v. McDonald,* 176 F.3d 1192, 1196 (9th Cir.1999), *and Rylewicz v. Beaton Servs., Ltd.,* 888 F.2d 1175, 1180 (7th Cir. 1989) (both holding that non-party witnesses lack standing).
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evidence that the Police Officials affirmatively committed "act[s] in furtherance" of their conspiracy to have Kinney and Hall removed from their ETPA positions long after *Haddle*, not just before. In particular, Kinney and Hall claim (and the Police Officials conceded in their depositions) that the Police Officials continued to prohibit their officers from enrolling in Kinney's or Hall's classes for the entire time that they were working as instructors at the ETPA; at least one of the defendants continued to boycott the entire ETPA during that time. Hall's resignation from the ETPA became effective on January 3, 1999, and Kinney's ETPA contract did not expire until September 1999. Viewing the summary judgment record in the light most favorable to Kinney and Hall, it is reasonable to infer that if the Police Officials had ceased their boycott in the wake of *Haddle*, Holda may have reconsidered his conclusion that it was no longer economically viable for Kilgore College to offer Kinney's and Hall's courses, and thus Kinney and Hall might not have been injured. In the end, it may be that much of the damage was done while the Police Officials still enjoyed qualified immunity; nonetheless, Kinney and Hall are entitled to pursue their claims for any damages traceable to "act[s] in furtherance" that occurred after the illegality of the Police Officials' actions become clear.

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We note that there is a question as to our jurisdiction to entertain an argument relating to statutory standing (as opposed to constitutional standing) in the context of an interlocutory appeal. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334-36 (11th Cir. 1999); *Triad Assoc. v. Robinson*, 10 F.3d 492, 496 n.2 (7th Cir. 1993). We need not resolve the question, however, as the defendants did not raise this issue in the district court or before the panel. They are of course free to raise the argument in further proceedings below.

Viewing the facts in the light most favorable to Kinney and Hall, the conduct at issue in this case falls within the core of § 1985's post-*Haddle* meaning. There was sufficient evidence to show that the defendants agreed to retaliate against Kinney and Hall on account of the instructors' testimony against police officers in a federal case, and, as in *Haddle*, the retaliation took the form of interference with the instructors' employment relationship, namely by boycotting their classes and pressuring the ETPA to fire them. We thus conclude that the Police Officials' conduct was objectively unreasonable in light of clearly established law, and the district court properly denied their motion for summary judgment with respect to the § 1985 claim.

We emphasize that the statute does not create liability for every adverse action taken against a witness after the witness testifies in a federal case. In addition to the requirement that there be a cognizable injury to the witness or his property (discussed above), the statute itself contains another limiting principle: the conspirator must threaten or injure the witness "on account of his having so attended or testified"—that is, because of, and by reason of, a person's participation as a witness. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (1963) (defining the phrase "on account of" to mean "for the sake of: by reason of: because of").[22] The defendants have said that they had

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22. Our reading of the "on account of his having so attended or testified" language in § 1985 parallels the Supreme Court's interpretation of similar language in 18 U.S.C. § 241, the criminal counterpart to § 1985. Section 241 criminalizes, *inter alia*, conspiracies to injure or intimidate a citizen in the free exercise and

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concerns about the instructors' abilities and ethics. The district court found, however, that there was sufficient evidence for a jury to conclude that the defendants acted to punish the plaintiffs because they had testified against the police. In further proceedings in this case, the defendants may be able to resolve this factual dispute in their favor.

VI. FIRST AMENDMENT CLAIM

Kinney and Hall claim that the defendants unlawfully retaliated against them for exercising their rights to free speech guaranteed by the First Amendment and made applicable to state actors by the Fourteenth Amendment. The district court evaluated the plaintiffs' claim according to the law governing First Amendment retaliation claims brought by public employees. *See Kinney,* 111 F.Supp.2d at 837. Acknowledging that Kinney and Hall were not employees of the Police Officials, the district court noted that in *Board of County Commissioners v. Umbehr,* 518 U.S. 668 (1996), the Supreme Court held that the First Amendment analysis applicable to claims by public employees also applies to First Amendment claims brought by the government's independent contractors. Having considered the relationship between Kinney and Hall and the police agencies that have long used their services, the district court concluded that

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enjoyment of federal rights "because of [the citizen's] having so exercised the same." Interpreting this language in *United States v. Guest,* 383 U.S. 745 (1966), the Court stated that § 241 would not reach every conspiracy that affected a federal right, but only a conspiracy whose "predominant purpose" was to deter or punish the exercise of the federal right. *Id.* at 760.

Kinney and Hall are "the equivalent of . . . governmental independent contractor[s]." *Kinney,* 111 F. Supp. 2d at 841 (citing *Umbehr,* 518 U.S. at 674).

As the district court recognized, a First Amendment retaliation claim in the employment context has four elements: (1) the plaintiff suffered an adverse employment decision, (2) the plaintiff's speech involved a matter of public concern, (3) the plaintiff's interest in speaking outweighed the governmental defendant's interest in promoting efficiency, and (4) the protected speech motivated the defendant's conduct. *See Lukan v. N. Forest ISD,* 183 F.3d 342, 346 (5th Cir. 1999). The district court determined that Kinney and Hall had proffered sufficient evidence to withstand summary judgment on those elements. First, the district court found that both instructors presented evidence that they had suffered adverse employment actions by being forced to accept lower paying jobs as a result of the Police Officials' boycott. *Kinney,* 111 F. Supp. 2d at 838. Second, the court determined that the plaintiffs' testimony regarding the use of excessive force by police officers was unquestionably a matter of public concern. *Id.* Third, applying the balancing test set forth in *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968), the district court determined that the balance weighed in favor of Kinney and Hall; that is, the instructors' interest in commenting on a matter of public concern outweighed the Police Officials' interest in promoting the efficient delivery of public services. *Kinney,* 111 F. Supp. 2d at 838.[23] Fourth, the district court found that

23. This balancing was of course informed by the district court's evaluation of the summary judgment evidence. Specifically, regarding

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the instructors' speech motivated the Police Officials' actions. *Id.* Then, turning specifically to the question of qualified immunity, the court determined that the relevant law was clearly established at the time of the alleged violation and that the Police Officials' conduct was objectively unreasonable in light of that clearly established law. *See id.* at 840-44.

As we noted in our analysis of the plaintiffs' § 1985 claims, the threshold issue in a qualified immunity inquiry is whether, taken in the light most favorable to the party asserting the injury, Kinney and Hall have shown that the Police Officials' conduct violated their constitutional rights. *See Saucier,* 533 U.S. at 201. Only if we determine that the plaintiffs' evidence shows a constitutional violation do we address the question whether "[t]he contours of the right [were] sufficiently clear [at the time of the alleged violation] that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640.

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the Police Officials' assertions that the instructors' speech threatened to disrupt the efficient provision of public services, the district court remarked as follows:

> There are genuine issues of fact remaining in this case as to whether the plaintiffs' expert testimony could legitimately cause any disruptions in the defendants' operations. Moreover, it must be determined whether these disruptions, if any, were the result of a perceived "conflict of interest" or the "blackballing" of plaintiffs for turning against one of their own.

111 F. Supp. 2d at 843.

We begin, then, by asking whether the Police Officials' conduct amounts to a violation of the plaintiffs' right to free speech. This requires us first to identify the proper First Amendment analysis.

A. What is the applicable First Amendment analysis?

The First Amendment shields speech "not only [from] direct limitations . . . but also [from] adverse government action against . . . individual[s] because of [their speech]," including the denial of public benefits to punish individuals for their speech. *Colson v. Grohman,* 174 F.3d 498, 508 (5th Cir. 1999).

At the outset, the Police Officials contend that their conduct is not actionable under the First Amendment because their decisions on whether and where to enroll officers are discretionary in the sense that no contract required them to enroll their officers in Kinney's and Hall's courses. This assertion overlooks the fundamental point that governmental discretion is always constrained by the Constitution. As the Supreme Court stated in *Perry v. Sindermann*, the *locus classicus* of the "unconstitutional conditions" doctrine:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes

> his constitutionally protected interests—especially, his interest in freedom of speech.

408 U.S. 593, 597 (1972). The county officials in *Umbehr* were under no duty to place contracts with the plaintiff's trash-hauling business, nor did the plaintiff have a right to those contracts; it was an at-will relationship. *See Umbehr*, 518 U.S. at 670-71. The point of such cases, as we have long made plain, is the government's duty not to punish protected speech, not the citizen's supposed "right" to government patronage.[24] In the instant case, the district court found sufficient evidence not only that the defendants deprived Kinney and Hall of the benefit of continued enrollment in their courses—a form of public patronage—but also that at least some of the defendants sought to have the instructors removed from the academy altogether. That no contract forbade this is irrelevant.

The Police Officials also suggest that their relationship with Kinney and Hall was too attenuated to create the requisite governmental power over the instructors. Specifically, the Police Officials argue that their conduct did not deny Kinney and Hall the benefit of employment because

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24. *See N. Miss. Communications, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986) ("Although the [plaintiff newspaper] may have had no 'right' to receive certain legal advertising from the County Board of Supervisors, it would violate the Constitution for the Board to withhold public patronage, in the form of its advertising, from the [newspaper] in retaliation for that newspaper's exercise of first amendment rights, or, in similar reprisal to threaten commercial advertisers with a loss of county business should they continue to advertise in the [newspaper].").

Kilgore College, and not the Police Officials, held the authority to refuse to renew Kinney's and Hall's contracts. We reject this line of argument. The Supreme Court has made it clear that First Amendment protection does not depend on whether the governmental action at issue is "direct" or "indirect." To hold that the Police Officials' conduct cannot constitute a First Amendment violation because they did not directly deprive Kinney and Hall of their jobs, but instead used governmental power to exert economic pressure on the instructors' employer in order to achieve that same result, "would allow the government to 'produce a result which [it] could not command directly.'" *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (alteration in original). The defendants' "attenuation" argument is fundamentally misguided, for the situation in which the economic relationship between the government and the speaker is the most attenuated would be the case in which the speaker is an ordinary citizen with no employment-related ties to the government. In this limiting case for the defendants' attenuation argument, the First Amendment would plainly forbid the government from pressuring the citizen's employer to fire the citizen as punishment for trial testimony that the government disliked. The degree of attenuation present in a given case may well bear on causation—that is, it may be easier for a government official to fire his own employee than to persuade a contractor to fire one of its employees—but this does not change the official's First Amendment duty. We thus reject the defendants' initial arguments that the First Amendment has no bearing on this case.

Appendix A

While all citizens enjoy the protections of the First Amendment, the appropriate analytical framework for applying the "unconstitutional conditions" doctrine to a given First Amendment claim depends on the context in which the claim arose. As the Supreme Court explained in *Umbehr*, the cases form a "spectrum" ranging from, at one end, cases involving "government employees, whose close relationship with the government requires a balancing of important free speech and government interests" and, on the other end, cases involving "ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 518 U.S. at 680.

Because the government has no legitimate interest in denying a benefit to "ordinary citizens" on account of their speech on matters of public concern, there is no interest balancing involved in the First Amendment analysis for "ordinary citizen" cases. Rather, the First Amendment is violated in "ordinary citizen" cases if the individual engaged in conduct protected by the First Amendment and the government took action against the person because of that protected conduct. *See, e.g., Rolf v. City of San Antonio,* 77 F.3d 823, 827 (5th Cir. 1996). In "governmental employee" cases, by contrast, courts must be attentive to the "[t]he government's interest in achieving its goals as effectively and efficiently as possible," which interest "is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill,* 511 U.S. 661, 675 (1994) (plurality opinion).

The Supreme Court set out the basic analytical structure for "governmental employee" balancing cases in *Pickering v. Board of Education*, 391 U.S. at 568. In that case, the Court held that a board of education violated a teacher's First Amendment rights by discharging him in retaliation for his criticism of the board's budget decisions. *Id.* at 566, 574-75. In so holding, the Court emphasized that government employees "may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [institutions] in which they work." *Id.* at 567-68. The Court also recognized, however, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* Thus, explained the Court, it is necessary "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

In *Umbehr* and its companion case, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Supreme Court held that the "governmental employee" version of the unconstitutional conditions doctrine—that is, the *Pickering* balancing inquiry—is also appropriate where an independent contractor alleges a First Amendment violation against the government. *See O'Hare Truck Serv.*, 518 U.S. at 720-24; *Umbehr*, 518 U.S. at 677-78, 684-85. The Court reasoned that "[i]ndependent government contractors are similar in most relevant respects to

government employees." *Umbehr,* 518 U.S. at 684. Specifically, the Court noted:

> The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all. But either type of relationship provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, "are often in the best position to know what ails the agencies for which they work."

Id. at 674 (quoting *Waters,* 511 U.S. at 674).[25]

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25. Based on reasoning similar to that of the Supreme Court in *Umbehr* and *O'Hare Truck Service,* this court has also applied a *Pickering* balancing test in First Amendment retaliation cases arising outside the public employment context. *See, e.g., Copsey v. Swearingen,* 36 F.3d 1336, 1344 (5th Cir. 1994) (holding that a *Pickering* balancing analysis was the appropriate framework for evaluating a vending stand operator's First Amendment claim based on a state agency's revocation of his license after he publicly criticized the licensing program); *Caine v. Hardy,* 943 F.2d 1406, 1415-16 (5th Cir. 1991) (en banc) (treating an anesthesiologist with clinical privileges at a public hospital as a "public employee" for purposes of his First Amendment claim based on the hospital's permanent suspension of his clinical privileges after he opposed a proposal made by the chief of anesthesiology).

Appendix A

As we have explained in past cases, the determination whether the relationship between the government and an individual falls on the "governmental employee" end of the *Umbehr* spectrum turns on whether the relationship is sufficiently "analogous to an employment relationship." *See Blackburn v. City of Marshall*, 42 F.3d 925, 932 (5th Cir. 1995). Applying this standard in *Blackburn*, we held that the *Pickering* balancing test was not applicable to a wrecker service owner's First Amendment retaliation claim against police officials for revoking his permission to use the police radio frequency after he criticized the police department's contracting procedures. *Id.* at 930, 934. The revocation of radio privileges rendered the service unable to participate in a rotation system for removing damaged vehicles from the scenes of accidents. *Id.* at 930. We reasoned in *Blackburn* that the business relationship between the wrecker service owner and the police department did not implicate employment-type ties but was instead similar to the relationship between the parties in *North Mississippi Communications*, another case in which we applied the "ordinary citizen" version of the "unconstitutional conditions" doctrine. *See Blackburn*, 42 F.3d at 934. *North Mississippi Communications* involved a newspaper's First Amendment claim alleging that county officials had ceased placing legal notices in the newspaper in retaliation for the newspaper's publication of editorials that criticized the board and its members. 792 F.2d at 1337. We did not apply a *Pickering* balancing test to the newspaper's First Amendment claim, but rather held that "it would violate the Constitution for the Board to withhold public patronage, in the form of its advertising, . . . in retaliation for that newspaper's exercise of first amendment rights." *Id.*

Appendix A

The parties in this case disagree over which First Amendment analysis—*Pickering* balancing on the one hand or the "ordinary citizen" framework on the other—should apply to this case. Earlier, in arguing that their actions did not deny Kinney and Hall any actionable "benefits" for purposes of the unconstitutional conditions doctrine, the Police Officials emphasized their lack of employment-type ties to Kinney and Hall. In support of their argument regarding the appropriate First Amendment analysis, however, the Police Officials now characterize their relationship with the ETPA and ETPA instructors as sufficiently akin to employment to warrant a balancing of the Police Officials' interests against the free speech interests at stake in this case. Relying on *North Mississippi Communications* and *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000), Kinney and Hall respond that the "ordinary citizen" analysis is better suited to the circumstances of the instant case than is the "governmental employee" test. In *Worrell*, the Tenth Circuit declined to apply a *Pickering* balancing test to a First Amendment claim alleging that the law enforcement defendant pressured the plaintiff's employer to rescind the plaintiff's job offer in retaliation for the plaintiff's having testified as an expert witness on behalf of a criminal defendant. *See* 219 F.3d at 1202, 1209-12. Rather, the *Worrell* court determined that the appropriate First Amendment analysis for evaluating the plaintiff's claim was the "ordinary citizen" version of the unconstitutional conditions doctrine. *See id.* at 1212-13.

We agree with the district court and the Police Officials that a *Pickering* balancing analysis is appropriate in this case. The relationship between the Police Officials and ETPA

instructors such as Kinney and Hall implicates governmental interests similar to those involved in the public employment context. Law enforcement agencies have a legitimate interest in exercising discretion over the choice of the instructors who train the officers who will, in turn, carry out the agencies' public duties. Those interests include, for example, ensuring that the instructors are competent and knowledgeable, that they are adept at conveying that knowledge to officer-students, and that they maintain a good working relationship with law enforcement agency officials so that those officials can monitor the training that their officers receive. These interests are all relevant to the ultimate governmental interest that the *Pickering* balancing analysis is meant to protect, namely the interest "in promoting the efficiency of the public services [a law enforcement agency] performs." *Pickering*, 391 U.S. at 568.

The defendants do not dispute that the instructors spoke on a matter of public concern, nor can they question (in this interlocutory appeal) the district court's factual determinations regarding causation. Accordingly, we now consider whether, under *Pickering*, the district court correctly balanced the First Amendment interest in protecting Kinney's and Hall's speech against the Police Officials' interests in suppressing it.

B. Was there a First Amendment violation?

The *Pickering* test requires us to balance the speaker's First Amendment interests against the government's legitimate interests in the efficient provision of public services. In performing this balance, we must take care not

to exceed the scope of our interlocutory appellate jurisdiction. As explained earlier, *see supra* Parts II-III, we must accept the existence of those genuine issues of fact identified by the district court and the district court's concomitant characterization of the plaintiffs' summary judgment evidence. The question for us is whether the district court committed legal error in balancing the interests supported by the summary judgment record, viewing the record in the light most favorable to the non-movants.

Starting first with the plaintiffs' side of the scales, we conclude that Kinney and Hall present an extremely strong First Amendment interest. The weight of the First Amendment interest is, of course, not measured solely by the instructors' own personal gain, if any, from speaking.[26] It is, rather, a function of the social value of that speech. *See, e.g., Connick v. Myers,* 461 U.S. 138, 145 (1983) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (alteration in original) (internal quotation marks and citation omitted); *Brawner v. City of Richardson,* 855 F.2d 187, 192 (5th Cir.

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26. Contrary to some of the Police Officials' intimations, the plaintiffs' interests in speaking cannot be reduced to a mere pecuniary interest in, as the defendants put it, "moonlighting as experts-for-hire." The plaintiffs originally planned to be paid for their work in the Kerrville shooting case—just as Kinney had been paid in the past when he had testified as an expert in support of police officers—but they later decided that "it wouldn't be right to charge" because they "felt so strongly about the incident." As we explain in the text, the speech in this case is uncommonly valuable because of the *public's* interest in identifying, preventing, and remedying official misconduct, not because of any personal advantage to Kinney and Hall.

1988) (discussing, in the course of a *Pickering* balancing case, "the *public's interest* in the disclosure of misconduct or malfeasance" (emphasis added)). This court has emphasized the great First Amendment significance of speech bearing on official misconduct, "especially when it concerns the operation of a police department." *Brawner,* 855 F.2d at 191-92. Indeed, because individuals working in law enforcement "are often in the best position to know" about the occurrence of official misconduct, *Umbehr,* 518 U.S. at 674, "it is essential" that such well-placed individuals "be able to speak out freely" about official misconduct, *Pickering,* 391 U.S. at 572. Kinney and Hall, two experienced law enforcement trainers with expertise in weapons and the use of force, are ideally placed to offer valuable public comment about excessive force and the adequacy of police training and supervision, the key issues in the Kerrville trial.[27] Moreover, as the district court pointed out, "[i]ndividuals will have a hard time succeeding in an excessive force case without the assistance of experts who are intimately acquainted with police procedures." *Kinney,* 111 F. Supp. 2d at 838. Expert testimony is thus essential both in providing victims with "the only realistic avenue for vindication of

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27. The fact that Kinney and Hall spoke as expert witnesses does not mean that their speech was less valuable than other forms of speech that reveals official misconduct. By virtue of their experience and expertise, witnesses like Kinney and Hall play an essential role in identifying police misconduct. There was no secret about the fact that Eddie Gonzales had been shot by the police in Kerrville; the public did not need an expert witness to reveal that. The public does need experts like Kinney and Hall, however, to reveal whether the shooting was an unjustified use of force or the result of inadequate training or supervision.

constitutional guarantees," *Harlow*, 457 U.S. at 814, as well as in serving § 1983's parallel deterrent function, *see Owen v. City of Independence*, 445 U.S. 622, 651 (1980). We thus conclude that Kinney and Hall have a particularly weighty First Amendment interest on their side of the *Pickering* scales.[28]

We turn next to the Police Officials' side of the *Pickering* balance. Stated in its most general terms, the government has an interest in "promoting the efficiency of the public services [that the governmental agency] performs." *Pickering*, 391 U.S. at 568. In the instant case, given the Police Officials' objective of providing effective law enforcement, all sides recognize that they have a strong interest in assuring the effective training of their law enforcement personnel. As the Supreme Court has made clear, however, the relevant issue is not the weight of the governmental interest considered in abstract terms; we look instead to how the speech at issue *affects* the government's interest in providing services efficiently. It is the speech's detrimental effect on the efficient delivery of public services that gives the government a legitimate interest in suppressing it. This is illustrated, for example, by *Rankin v. McPherson*,

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28. Judge Jones would minimize the importance of the free speech interest at stake here on the ground that Kinney and Hall testified voluntarily. (Kinney and Hall were actually subpoenaed, but they admit that they appeared voluntarily.) In doing so, she relies on the Third Circuit's decision in *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3d Cir. 1997). The plaintiff in *Green* was demoted after he agreed to testify, as a favor for a friend, as a character witness at the friend's son's bail hearing. *Id.* at 884. Such testimony is of much less public importance than the testimony here.

483 U.S. 378, 381 (1987), a case in which an employee in a constable's office remarked, upon hearing about the attempted assassination of President Reagan, "[I]f they go for him again, I hope they get him." The *Rankin* Court did not consider the defendant constable's generalized interest in maintaining discipline—certainly an important interest—but the Court instead asked whether the speech at issue, given the context and the employee's duties, actually impaired office operations. "In performing the [*Pickering*] balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Id.* at 388. Thus, the question in this case is not whether the police have an interest in "effective training"—no one would deny that—but rather whether, on this record, they could reasonably think that interest threatened by the plaintiffs' protected speech such that the Police Officials may legitimately suppress that speech.

In recognizing that the governmental interests at stake in a particular case necessarily depend upon the facts of the case, we most certainly do not, as the dissent asserts, pervert the First Amendment analysis by changing the *Pickering* balancing inquiry into a question for the jury. It is for the court to determine the importance of a plaintiff's speech interest, to determine the importance of a governmental interest in efficient operations, and to balance the relative weight of each. But the governmental interests that are at stake in a particular case necessarily depend on the facts of the case. As a matter of law, the Police Officials surely have an array of weighty interests in various matters, but those interests are only relevant to this case if, as a matter of fact,

a certain interest is threatened. In this case— an interlocutory appeal of a denial of summary judgment—we are not permitted to indulge in our own preferred view as to the true facts of the case, much less can we simply accept the defendant's version of the disputed facts as true. Instead, we must accept the genuine factual disputes identified by the district court and conduct the inquiry as if the plaintiffs' version is true. That is how this circuit, like other circuits, handles the substantive law of *Pickering* balancing in the procedural posture of summary judgment when the material facts are disputed. *See, e.g., Victor v. McElveen,* 150 F.3d 451, 457 (5th Cir. 1998) (explaining that a sheriff was unable to show that his interests in efficient functioning of the department outweighed a deputy's speech interests, given that it was disputed whether the comment was disruptive).[29]

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29. *See also Johnson v. Ganim,* 342 F.3d 105, 114-15 (2d Cir. 2003) (denying summary judgment and qualified immunity because of factual dispute regarding whether plaintiff's speech reasonably could disrupt the government employer's operations); *Gustafson v. Jones,* 290 F.3d 895, 909 (7th Cir. 2002) ("*Pickering* balancing is not an exercise in judicial speculation. While it is true that in some cases the undisputed facts on summary judgment permit the resolution of a claim without a trial, that means only that the *Pickering* elements are assessed in light of a record free from material factual disputes."); *Domina v. Van Pelt,* 235 F.3d 1091, 1098-99 (8th Cir.2000) (denying summary judgment and qualified immunity due to factual dispute over whether employee's speech created workplace disharmony and affected morale); *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 585 (6th Cir. 2000) (reversing grant of summary judgment because material factual disputes bore on *Pickering* balance); *cf. Shands v. City of Kennett,* 993 F.2d 1337, 1342-43 (8th Cir. 1993) (instructing district courts to submit special interrogatories to the jury on the question of whether the employee's speech was disruptive).

The dissent is thus incorrect if it suggests that First Amendment cases present an exception to the general rule that we do not resolve genuine factual disputes at the summary judgment stage. Put differently, engaging in *Pickering* balancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it. *Gustafson*, 290 F.3d at 909-10; *see Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir.1993) ("There was no interest to balance [in the *Pickering* inquiry] when this [potential] reason was rejected factually."). We do not let the governmental defendant prevail, *on summary judgment*, by relying on interests that, viewing the record in the non-movant's favor, are not reasonably threatened in the case.

With these principles in mind, we now turn to the Police Officials' asserted grounds for taking action against Kinney and Hall. In canvassing the possible harms caused by the plaintiffs' Kerrville testimony, we note first that some of the workplace disruptions cited by the Police Officials are simply irrelevant to the *Pickering* calculus. It is of course true, as the defendants point out, that the boycott strained the relationship between the ETPA and the local police agencies. In addition, the boycott may have caused tension between Holda and the plaintiffs, although Holda did defend Kinney and Hall in the media and attempt to resolve the boycott amicably. Those types of disruptions might have given *the ETPA* a sound reason for taking action against Kinney and Hall, but they cannot be counted in the Police Officials' favor. The disruptions just noted were caused by the Police Officials' boycott, so the Police Officials can hardly rely on those disruptions as a justification for their boycott. The

question is whether the plaintiffs' testimony posed a threat to the Police Officials' ability to deliver police services, not whether the Police Officials caused a disruption in response to it.[30]

With regard to the question whether the plaintiffs' speech impaired the Police Officials' training operations, the district court concluded, based upon its review of the record before it, that the defendants had not identified any damage to the efficiency of their operations brought about by Kinney's and Hall's testimony in Kerrville. *Kinney,* 111 F. Supp. 2d at 842. This finding is not itself determinative, for we (like those in dissent) are mindful of the fact that a prudent administrator will often wish to take action before a risk ripens into an actual workplace disruption. The key limitation on preemptive action, however, is that the officials' predictions of disruption must be *reasonable. See Waters,* 511 U.S. at 673; *Connick,* 461 U.S. at 154; *Brawner,* 855 F.2d at 192 (asking whether speech was "likely" to disrupt police

30. *Cf. Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 378 n.19 (5th Cir. 2000). Other courts have likewise rejected the circular argument advanced by the Police Officials. *See Worrell,* 219 F.3d at 1210-11 ("[A]cting with retaliatory intent, a third party upon whose cooperation the employer depended could refuse to cooperate with the employer unless a particular employee were fired, demoted, or transferred. By withholding cooperation, the third party could effectively create the very workplace disruption that, under the *Pickering* approach, could be used to justify the limitation of First Amendment rights."); *cf. Hughes v. Whitmer,* 714 F.2d 1407, 1434 (8th Cir. 1983) (McMillian, J., dissenting) ("It would be anserine to permit the government to discipline its employees because of disruption caused by the government's repressive reaction to the employee's first amendment activities.").

department's operations); *see also Gustafson*, 290 F.3d at 911 (denying police officials' request for qualified immunity and remarking that "mere incantation of the phrase 'internal harmony in the workplace' is not enough to carry the day" (internal quotation marks omitted)). "Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete." *Waters*, 511 U.S. at 677. The reason for this rule should be obvious: Disruption is always possible, but to give deference to unfounded predictions of harm would allow the government arbitrarily to punish speech under the guise of preempting disruption. That is, it would permit the government "to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech," *Rankin*, 483 U.S. at 384. The district court addressed the issue of whether disruption was a reasonable prospect, and its conclusion was that "[t]here are genuine issues of fact remaining in this case as to whether the plaintiffs' expert testimony could legitimately cause any disruptions in the defendants' operations." *Kinney*, 111 F. Supp. 2d at 843.[31] We are not free to disregard that conclusion in this appeal.

The Police Officials claim that Kinney's and Hall's testimony damaged training by creating a "conflict of interest" and "violat[ing] . . . principles of cooperative responsibility [and] trust." Needless to say, reasonable officials should be concerned about conflicts of interest, and

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31. In this regard, it should be remembered that the record does not contain any affidavits or depositions from trainees who stated that they lost confidence in the instructors. Kinney and Hall stated that their relationships with students were not adversely affected.

they can rightfully demand that their employees and contractors not abuse the trust the government places in them. Based upon the summary judgment record, however, the district court was unable to determine whether the Police Officials had concerns about genuine conflicts of interest or were instead, as Kinney and Hall contend, merely interested in enforcing a "code of silence" against the plaintiffs. *Id.* at 835, 838, 843.[32] One of the main reasons for the district court's conclusion was that the Police Officials have asserted an interest in suppressing testimony that involved a police agency hundreds of miles away, well outside of the ETPA's service area. The record shows that the Police Officials see a conflict of interest whenever and wherever a police trainer testifies against police officers. Regardless of whether one uses the label "code of silence," we believe that, on this record, the defendants' asserted notion of "conflicts of interest" sweeps so broadly as to undermine its status as a

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32. The so-called "code of silence," as we have explained in previous cases, is the informal rule according to which one police officer does not report on or testify against another police officer, regardless of the nature of the accused officer's conduct. *See, e.g., Snyder v. Trepagnier,* 142 F.3d 791, 797 n.6 (5th Cir.1998) (citing an expert witness).

The Police Officials have asserted in their briefs that Kinney and Hall admitted that the Police Officials had genuine and reasonable concerns about conflicts of interest. We do not believe that the Police Officials' reading of the record is warranted. In their depositions, Kinney and Hall admitted that reasonable people could be concerned about conflicts of interest when an instructor testifies against his own students. They deny, however, that reasonable people would be concerned about conflicts of interest in this case, and they deny that the Police Officials held genuine concerns about conflicts.

legitimate government interest that can properly weigh in the *Pickering* balance.[33] The persuasiveness of the Police Officials' asserted concern sinks further still when one considers that they not only refused to send students to Kinney's and Hall's classes—that might be a proper response to concerns about an instructor—but the Police Officials also tried to have the instructors fired, which tends to imply that the defendants were trying to do more than prevent a conflict of interest. If anything, the Police Officials' sweeping (yet one-sided) notion of "conflicts of interest" tends to impair the efficient provision of public services, inasmuch as it thwarts the important public objective of preventing police misconduct.[34] As the Supreme Court counseled in *Rankin*,

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33. The *Pickering* balance takes account of legitimate interests only. *See Umbehr*, 518 U.S. at 675 (referring to "*legitimate* countervailing government interests") (emphasis added); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1270 (5th Cir.1992) ("Though the speech of public employees may be of public concern, that speech still does not enjoy First Amendment protection if *legitimate* government interests in limiting the speech outweigh the employees' interest in speaking.") (emphasis added).

34. As this court has recognized, government agencies have an interest in protecting speech relating to official misconduct, and there are circumstances in which that interest counterbalances the governmental interest in suppressing disruptive speech. *See Victor*, 150 F.3d at 457 (observing, in connection with a deputy sheriff's First Amendment claim, that "concerns about maintaining harmony and eliminating disruption cannot be the sole measure of government interest when the employee's speech furthers other important state interests"); *Frazier v. King*, 873 F.2d 820, 826 (5th Cir. 1989) (stating, in a First Amendment case brought by a nurse who worked in a prison, that "[a]lthough [the plaintiff's] 'whistle blowing' obviously created

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another case that arose in the law enforcement context, "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." 483 U.S. at 384.

Similar comments are in order regarding the Police Officials' asserted interests in loyalty and esprit de corps, heavily relied upon by the dissent. No one would doubt but that those are important considerations, especially in a police department. Even within a police department, however, the mere assertion of interests in preserving loyalty and close working relationships does not end the debate as it would if this were a rational basis inquiry. *See Branton v. City of Dallas*, 272 F.3d 730, 741 (5th Cir. 2001). When the dissent trumpets the need for "institutional loyalty," Jones dissent at 395, one must ask what institution the plaintiffs have wronged by testifying against distant officers that they have never met. The Police Officials' charge of disloyalty makes sense only if Kinney and Hall owe fealty to law enforcement universally. Indeed, the Police Officials' stated view is that one is disloyal—and has committed an unforgivable "sin"—whenever one testifies against law enforcement officers anywhere. A concept of loyalty that sweeps so broadly is not one that may legitimately trump compelling interests in speaking on matters of public concern.

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tension and difficulties at [the prison], when weighed against the exposure of unethical medical practices affecting hundreds of inmates, the disruption is a minimal interest").

Appendix A

The district court's conclusions with respect to the question of workplace disruption—or rather, the absence thereof—distinguish the instant case from a case like *Tedder v. Norman*, 167 F.3d 1213 (8th Cir. 1999). In *Tedder*, the deputy director of a police academy testified as an expert witness against one of the agencies that sent trainees to the academy. It is quite understandable how this could raise real concerns, including concerns about conflicts of interest. Accordingly, the *Tedder* court found that the "actual disruption and potential further disruption" caused by the plaintiff's testimony justified the academy's decision to demote him. *Id.* at 1215. Here, in contrast, the district court concluded that there was a genuine dispute over whether the plaintiffs' activities did in fact, and reasonably could be expected to, impair proper training.

When we accept the factual disputes identified by the district court and view the disputed facts in the light most favorable to Kinney and Hall, we find that the Police Officials have not articulated any relevant, cognizable interests in suppressing the plaintiffs' speech, while Kinney and Hall have presented a strong First Amendment interest in testifying about police brutality and inadequate supervision and training. Therefore, we conclude that, at the summary judgment stage, the instructors' interest in testifying easily outweighs the Police Officials' interest in suppressing their speech, given that the speech involved unrelated police agencies hundreds of miles away.

Our decision should not be taken to mean that police agencies do not enjoy broad latitude in managing the training of their officers, including significant discretion over the

choice of instructors. There are any number of legitimate reasons why police officials can stop using a particular instructor or academy; barring contractual commitments, they can do so for no good reason at all. In order to do so on a basis that penalizes protected speech, however, they must explain why their need to suppress the speech outweighs the countervailing First Amendment interest in free expression. At this early stage of the proceedings, there is a genuine dispute as to whether the Police Officials had any legitimate interests that could justify their decision to boycott and seek the termination of instructors who had testified in a distant trial against unrelated police agencies.

To summarize: Kinney and Hall spoke on a matter of public concern, and the value of their speech prevails, at the summary judgment stage, over the opposing governmental interests in the *Pickering* balance. Since the district court also found that Kinney and Hall established a genuine factual issue regarding whether the Police Officials boycotted Kinney's and Hall's courses and sought to have them removed from the ETPA faculty because of their testimony, *Kinney*, 111 F. Supp. 2d at 838, 843, the facts set forth by Kinney and Hall are sufficient to state a First Amendment violation. The first step of the qualified immunity analysis is thus complete. We next turn to the question of "clearly established" law—that is, whether it would have been apparent to a reasonable officer at the time of the alleged violation that the Police Officials' conduct violated the First Amendment.

C. Are the Police Officials entitled to qualified immunity?

The First Amendment right to free speech was of course clearly established in general terms long before the events giving rise to this case. In order to defeat the Police Officials' claim of qualified immunity, however, Kinney and Hall must show that "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Qualified immunity should not be denied unless the law is such that reasonable officials should be "on notice [that] their conduct is unlawful." *Saucier*, 533 U.S. at 206. It bears repeating once more that our factual guide is the district court's view of the record, and the legal question is whether the defendants' conduct violated clearly established law measured against the facts that the district court believed the plaintiffs could prove at trial. *See Behrens*, 516 U.S. at 313.

There is no question that it was clearly established well before October 1998 that Kinney's and Hall's testimony was of public concern and thus was speech protected by the First Amendment.[35] The Police Officials do not attempt to argue otherwise, but rather suggest that it was not clear that the First Amendment imposed any restrictions on their conduct

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35. Testimony in judicial proceedings "is inherently of public concern." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989); *see also Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987) (testimony in civil proceedings); *Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982) (testimony in criminal proceedings); *Rainey v. Jackson State Coll.*, 481 F.2d 347, 349-50 (5th Cir. 1973) (testimony of expert witness).

vis-a-vis Kinney and Hall as their training instructors. This, of course, is the same argument we rejected earlier, in discussing whether Kinney and Hall had set forth evidence of conduct that would amount to a constitutional violation at all. In arguing for qualified immunity, the Police Officials contend that there was at least a reasonable legal basis for their view, even if it was ultimately wrong. More specifically, the Police Officials say that their duties with respect to Kinney and Hall were unclear because the instructors were "employees of a 'disappointed bidder'—i.e., Kilgore College." The Police Officials apparently base this contention in part on the *Umbehr* Court's admonishment that "[b]ecause [this] suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." 518 U.S. at 685.

Initially, we reject the defendants' attempt to characterize Kinney and Hall as employees of a disappointed bidder. Neither Kilgore College nor ETPA instructors such as Kinney and Hall were mere "bidders" in the sense that they lacked a "pre-existing commercial relationship" of the sort that the Court was concerned about in *Umbehr*—i.e., a relationship that the Police Officials could use to inhibit speech. *See id.* at 674 (reasoning that a *Pickering* balancing analysis is appropriate in cases involving the government's independent contractors or providers of regular services as well as its employees because both "type[s] of relationship provide[] a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern"). The Police Officials had the power to deny Kinney

and Hall significant benefits as ETPA instructors, and it is the existence of that sort of power—and not mere labels describing governmental relationships—that is relevant for purposes of the First Amendment. *See O'Hare Truck Serv.*, 518 U.S. at 721-22; *Umbehr*, 518 U.S. at 678-79.

More fundamentally, we reject the Police Officials' suggestion that it would have been reasonable for officers in their positions to believe that they were unfettered by the First Amendment merely because their economic relationship with Kinney and Hall was non-employment and non-contractual. Both the Supreme Court and this court have explicitly rejected such reasoning. In *O'Hare Truck Service*, the Court rejected "the proposition . . . that those who perform the government's work outside the formal employment relationship are subject to what we conclude is the direct and specific abridgment of First Amendment rights." 518 U.S. at 720. Similarly, in *Blackburn*, we stated that the "assumption that only public employees enjoy the protections of the First Amendment" rested on "inverted" reasoning because "[e]very citizen enjoys the First Amendment's protections against governmental interference with free speech." 42 F.3d at 931. As we explained in *Blackburn*, the Supreme Court did not formulate the "governmental employee" version of the "unconstitutional conditions" doctrine in order to limit the First Amendment to the public employment context, but rather in order to take into account that "the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship." *Id.* Indeed, the Supreme Court's decisions in *Pickering*, *Umbehr*, and *O'Hare Truck Service* are predicated on the assumption that although the

government may have other relationships with individuals in addition to the citizen-sovereign relationship, individuals do not, as a result of such relationships, cease to be citizens with First Amendment rights that the government is obligated to respect. Thus, we have little difficulty concluding that the Police Officials would be unreasonable in failing to recognize that they had First Amendment obligations toward Kinney and Hall.

Part VI.A of this opinion determined that the Police Officials were entitled to have the plaintiffs' First Amendment claim analyzed under a *Pickering* balancing inquiry, a framework that recognizes the Police Officials' legitimate interests in suppressing some speech that interferes with the provision of public services. To the extent that there was any uncertainty about the proper analytical framework, the uncertainty could not redound to the defendants' benefit, as the alternative would have been to hold the Police Officials to the higher standards that they must observe with respect to ordinary citizens. It is plain that the government cannot harry the employer of an ordinary citizen who gave unwelcome testimony, seeking to have the employee fired in retaliation. Giving the Police Officials the benefit of the *Pickering* balancing test, we must ask whether it was clearly established at the time of the Police Officials' conduct that the First Amendment forbade them from retaliating against Kinney and Hall, the employees of their contractor, on account of the instructors' Kerrville testimony. We conclude that it was.

Given that it is well-established in the jurisprudence of both the Supreme Court and this court that official

misconduct is of great First Amendment significance, and that this court has repeatedly emphasized the need to protect speech regarding police misconduct in particular, *see, e.g., Brawner,* 855 F.2d at 192, it would have been objectively unreasonable for an officer to conclude that Kinney's and Hall's testimony was anything other than highly valuable speech.[36] Suppressing that speech could be justified, they should have realized, only by a weighty governmental interest. *See Matherne v. Wilson,* 851 F.2d 752, 761 (5th Cir. 1988) (explaining that a greater disruption must be shown when the speech is of greater public concern).

As explained earlier, at this stage of the case it is disputed whether the Police Officials' legitimate interests were threatened by Kinney and Hall. The district court found that it was disputed whether the instructors' testimony in Kerrville disrupted, and even legitimately could disrupt, the Police Officials' training objectives. *Kinney,* 111 F. Supp. 2d at 843. On this record, the Police Officials' asserted interest in loyalty is unreasonable given the events at issue; certainly such interests cannot justify an attempt to force the instructors out of the academy altogether. Viewing the summary judgment facts in the light most favorable to the non-movants, the Police Officials pursued Kinney and Hall not because of genuine conflicts of interest but instead merely because Kinney and Hall had testified against a police officer. *Id.* at 838-39, 843, 845. When the disputed facts are viewed from the perspective of the plaintiffs' evidence—and that is the

36. As we explained earlier, that Kinney and Hall testified as experts rather than as fact witnesses does not mean that their speech fell outside of this particularly protected category. *See supra* notes 26-27 and accompanying text.

only perspective allowed on this interlocutory appeal, *see Behrens*, 516 U.S. at 313—the illegality of the Police Officials' actions is readily apparent. Summary judgment is therefore inappropriate.

The Police Officials contend that their conduct was reasonable in light of the fact that, when the boycott started in October 1998, the Texas Legislature and Texas A&M University had enacted policies that effectively prohibited state employees from serving as expert witnesses against the state, ostensibly because of inherent conflicts of interest. *See Hoover v. Morales*, 164 F.3d 221, 223-24 (5th Cir. 1998) (describing the policies). But the Police Officials could hardly have reasonably relied on these state policies as support for their own stand against purported conflicts of interest: The state policies had been challenged as violative of free speech, and a federal judge had preliminarily enjoined their enforcement on August 7, 1997, over a year before the boycott. This court affirmed that decision in an opinion issued July 23, 1998.[37] It would therefore have been unreasonable

37. The defendants have stated that *Hoover* was not decided until December 1998, after much (but by no means all) of the conduct at issue in this case. Their belief is probably based on the fact that the version of the *Hoover* opinion printed in the bound volume of the *Federal Reporter 3d* bears a date of Dec. 31, 1998. The July version of the opinion was published at 146 F.3d 304 in the advance sheet of the *Reporter*, but it was withdrawn from the bound volume in favor of the December version. The only difference between the two versions is the addition of one paragraph, placed at the end of the majority opinion, acknowledging that *some* restrictions on employee testimony—restrictions not before the court— might pass constitutional muster. *See Hoover*, 164 F.3d at 227. The Police

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to rely on these state policies for guidance on the meaning of the First Amendment.

In any event, we had spoken to such issues long before the controversy over the policies at issue in *Hoover*. For example, we held in *Rainey v. Jackson State College* that a teacher stated a claim under the First Amendment when a state college denied him employment in retaliation for his expert testimony for the defendant in a criminal obscenity case. *See* 435 F.2d at 1034 (*Rainey I*). In a later appeal of the same case, we noted that a college trustee had admitted that the plaintiff was denied the teaching position because of his testimony and the publicity surrounding the same; we observed that "[t]hese facts make out what appear to us to be a clear case of impermissibly freighting plaintiff's contract with a deprivation of the First Amendment right to free speech," and we ultimately held that the plaintiff was entitled to a judgment as a matter of law. *Rainey v. Jackson State*

(Cont'd)
Officials' conduct in no way resembles the types of restraints that *Hoover*'s appended paragraph suggested might be permissible. The paragraph indicated, for instance, that the state may have a greater interest in preventing policymaking employees from testifying, and that restraints are less troublesome if they are content-neutral. *Id.* Wholly unlike those examples, the conduct in the instant case looks much more like the blanket, viewpoint-based ban condemned in *Hoover* itself. Indeed, if we take the Police Officials at their word, their policy is that people like Kinney and Hall—the very people with the expertise that is required to prove claims of excessive force and inadequate police supervision and training—cannot testify in any case, anywhere, against the police because doing so is a conflict of interest.

Coll., 481 F.2d 347, 350 (5th Cir.1973) (*Rainey II*).[38] The *Rainey* decisions are themselves part of a long series of First Amendment cases in which we have condemned retaliation against court testimony, including retaliation against employees who gave testimony adverse to their employers' interests. *See Johnston*, 869 F.2d at 1568 (county employee fired for testifying on co-worker's behalf in an administrative hearing); *Reeves*, 828 F.2d at 1097-99 (school employee demoted for her civil testimony in favor of her co-employee against their employer).

Judge Jones's dissent discusses in some detail three cases from other circuits that, in her estimation, show that the defendants did not violate the First Amendment and should in any event be entitled to qualified immunity. Only one of these, the Third Circuit's decision in *Green*, was on the books when the Police Officials began their activities.[39] The plaintiff

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38. Part of the *Rainey* plaintiff's underlying claim had been mooted by the passage of time by the date of the second appeal; we reached the merits of the claim in order to determine whether he was entitled to attorneys' fees. *Rainey II*, 481 F.2d at 349. This was nonetheless a holding on the merits of the First Amendment claim, as a later appeal in the same saga recognized: "Our opinion in *Rainey II* considered and made findings on the merits and entered a judgment sustaining Rainey's claim that his termination of employment was unconstitutional." *Rainey v. Jackson State Coll.*, 551 F.2d 672, 675 (5th Cir.1977) (*Rainey III*).

39. The Eighth Circuit decided *Tedder* in February 1999, after the boycott had already caused Kinney's and Hall's classes to be cancelled and after Hall had already left ETPA. The Tenth Circuit decided *Worrell* in 2000. Both cases are discussed *supra*.

in *Green*, a police officer on a drug task force, agreed to testify as a character witness at the bail hearing of the son of a longtime friend. 105 F.3d at 884. The plaintiff left the hearing without testifying after he learned that the son was associated with organized crime. *Id.* The police agency demoted the officer anyway, citing their interest in avoiding the appearance of an association with organized crime. *Id.* at 884-85. Surely it would cast a police agency into disrepute if its vice officers were thought to consort with mob figures, but the Police Officials in this appeal cannot seriously claim that their agencies will be exposed to public obloquy if a police instructor they patronize testifies for the plaintiff in an excessive force case, just as he has before testified in favor of the police.[40] *Green* in no way supports the Police Officials' actions.

While some of the relevant First Amendment retaliation precedents in place in the fall of 1998 involved schools (like the *Rainey* cases and *Reeves*), and others of them (such as *Brawner* and *Victor*) have involved police departments, we concede that our past cases do not include one that has

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40. Relatedly, we do not understand the Police Officials' assertion, advanced by the dissent, Jones dissent at 394, that Kinney and Hall somehow exploited their association with ETPA. The instructors did not seek out their role in the Kerrville case; the victim's family approached them after failing to find any qualified local experts who would testify against the police. In order to establish their competence to offer expert opinion, surely the instructors' testimony would have to mention their place of employment. The Police Officials never complained about misuse of the good name of ETPA when an instructor gave expert testimony, with pay, in favor of the police.

specifically addressed retaliation against instructors at a police academy. We do not see the absence of such a case as an embarrassment to our conclusion that the Police Officials are not entitled to qualified immunity. If we accepted the defendants' view of what it means for the law to be clearly established, qualified immunity would be available in almost every case, even those cases in which "in the light of pre-existing law the unlawfulness [was] apparent," *Anderson*, 483 U.S. at 640. As the Supreme Court has recently admonished, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

Although we are sensitive to the fact that reasonable officials might not always be able to predict the outcome of a balancing test such as that used in *Pickering* cases, *see Noyola v. Tex. Dep't of Human Res.*, 846 F.2d 1021, 1025 (5th Cir. 1988),[41] we believe that in this case the illegality of

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41. *Noyola* observed that, because of the balancing required in *Pickering* cases, "[t]here will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." 846 F.2d at 1025. We do not think that this remark can be taken to set forth a rule of law to the effect that qualified immunity is mandated in *Pickering* cases; indeed, the *Noyola* opinion itself went on to analyze whether the plaintiff's alleged right actually was clearly established. *See id.* at 1025-26. *Noyola*' s statement facially takes the form of a prediction that denials of qualified immunity will be "rare[ ]" in the *Pickering* context. *Qua* prediction, it may not be an unreasonable one. Nonetheless, a number of this court's *Pickering* cases have denied qualified immunity. *See, e.g., Branton*, 272 F.3d at 741-46; *Wilson v. U1 Health Ctr.*, 973 F.2d at 1270; *Frazier*, 873 F.2d at 826-27. Underscoring the fact that

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the Police Officials' conduct is sufficiently clear that they can fairly be said to have been on notice of the impropriety of their actions. Indeed, given the factual disputes identified by the district court and taking the plaintiffs' side of those disputes, this case does not require any real balancing at all, for the Police Officials do not have any relevant, legitimate interests to put on their side of the *Pickering* scales. Our cases show that it is entirely appropriate to deny qualified immunity when the balance of cognizable interests weighs so starkly in the plaintiff's favor. *See, e.g., Boddie,* 989 F.2d at 750; *Frazier,* 873 F.2d at 826. This means that summary judgment must sometimes be denied in *Pickering* cases because of genuine factual disputes concerning whether admittedly legally important government interests are implicated on a given record. *See, e.g., Branton,* 272 F.3d at 741; *Kennedy,* 224 F.3d at 378-79; *Victor,* 150 F.3d at 457; *see also supra* note 29 (citing cases from other circuits). Of course, the ultimate resolution of those factual disputes may show that the Police Officials are entitled to qualified immunity from liability. *See supra* note 8.

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Noyola does not purport to command a particular result, three of the four Fifth Circuit *Pickering* cases that cite *Noyola deny* the official's claim of qualified immunity. *Compare Gunaca v. Texas,* 65 F.3d 467 (5th Cir.1995) (upholding a claim of qualified immunity), *with Harris v. Victoria Indep. Sch. Dist.,* 168 F.3d 216 (5th Cir.), *reh'g denied and opinion clarified,* 336 F.3d 343 (5th Cir.1999), *Boddie v. City of Columbus,* 989 F.2d 745 (5th Cir.1993), *and Brawner,* 855 F.2d 187 (all denying qualified immunity). (It should be noted that *Brawner* cites *Noyola* for a different proposition.) As we state in the text, *Noyola* is at its predictive nadir when, as in this case, there is no true balancing required because the defendant official has not set forth any substantial legitimate interest.

We close our discussion of qualified immunity by noting that, contrary to the position asserted by the Police Officials, the district court's review of the reasons for the Police Officials' boycott does not mean that the lower court, or this court, has engaged in a "subjective" analysis of the type condemned in *Harlow*. The Police Officials' position, apparently, is that they are entitled to qualified immunity as long as there exists some conceivable set of reasons that would have made their actions appropriate. Such factual scenarios doubtless exist. It would have been permissible for the Police Officials to pull their students out of Kinney's and Hall's classes if (for instance) the Police Officials learned that the instructors were unskilled. Therefore, the Police Officials suggest, we necessarily engage in a forbidden "subjective" inquiry if we take cognizance of a genuine dispute over the reasons for their actions against the instructors. What the defendants' approach would mean, of course, is that there can never be liability for any violation for which the elements include the official's intent or reasons for action. Most § 1983 claims do not include such an element, but First Amendment retaliation claims do: The First Amendment protects employees only from "termination *because of* their speech on matters of public concern," *Umbehr*, 518 U.S. at 675, not from termination *simpliciter*. Similarly, the Constitution forbids officials from discriminating on the basis of race only when their discrimination is *intentional*. *See Washington v. Davis*, 426 U.S. 229, 239-48 (1976). In such cases, reading *Harlow* as forbidding all discussion of intent would allow the qualified immunity defense to preclude recovery even when the law

was clearly established, for plaintiffs would be barred from proving an essential legal element of their case.[42]

When an official's intent or the reasons for his or her actions are an essential element of the underlying violation, we have treated factuai disputes over intent just like any other factual dispute that can justify a denial of qualified immunity. *See Tompkins v. Vickers*, 26 F.3d 603, 607-10 (5th Cir. 1994) (holding that the existence of a retaliatory motive was a factual issue that precluded summary judgment on qualified immunity in a First Amendment case in which a teacher claimed that he had been transferred in retaliation for criticizing the school superintendent); *see also Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 535 & n.6 (5th Cir. 1997) (stating that the court lacks jurisdiction on interlocutory appeal to review whether there is a genuine issue of fact as

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42. Indeed, the Supreme Court has explicitly distinguished, on the one hand, the focused inquiry into intent that a court must undertake in connection with certain constitutional violations, from, on the other hand, the wide-ranging "subjective" inquiry into bad faith condemned in *Harlow*. *Harlow* sought to prevent "an open-ended inquiry into subjective motivation [with the] primary focus . . . on any possible animus directed at the plaintiff." *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). That inquiry would burden officials unnecessarily, because whether the defendant official bore a generalized ill will toward the plaintiff is irrelevant to the question whether the defendant official has violated clearly established law. But when intent is an element of the predicate violation, such as in claims of intentional racial discrimination or First Amendment retaliation, the inquiry into intent is permissible because it is "more specific," focusing on "an intent to disadvantage all members of a class that includes the plaintiff or to deter public comment on a specific issue of public importance." *Id.* (citation omitted).

to intentional discrimination). Other circuits take the same view.[43]

As we have said, accepting the Police Officials' position would mean that every claim of qualified immunity would necessarily be upheld in those categories of cases that require proof of intent or motive. The proper approach, which treats intent as one fact issue among others, does *not* lead to the opposite extreme, namely that qualified immunity is never available in such cases. That too would be an intolerable result. Fortunately, in no area of the law can bare accusations of malice or evil intent withstand a properly supported motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir.1993) (stating that unsupported assertions of bad faith cannot create a genuine issue of fact; in such a case, "summary judgment is proper even if intent is an essential element of the nonmoving party's case"). Insubstantial suits against public officials can be handled

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43. *See, e.g., Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 97 (1st Cir.2003); *Thomas v. Talley*, 251 F.3d 743, 746 (8th Cir. 2001) ("In considering a qualified immunity defense, a court cannot disregard evidence of the intent that is an element of the plaintiff's case because if it did so the plaintiff could not show that the defendant violated clearly established law."); *Walker v. Schwalbe*, 112 F.3d 1127, 1132-33 (11th Cir. 1997) (citing cases and stating that "[w]here the official's state of mind is an essential element of the underlying violation, the state of mind must be considered in the qualified immunity analysis or a plaintiff would almost never be able to prove that the official was not entitled to qualified immunity. We hold, as every Circuit that has considered this issue has held, that where subjective motive or intent is a critical element of the alleged constitutional violation the intent of the government actor is relevant.").

through the "firm application of the Federal Rules of Civil Procedure," *Butz*, 438 U.S. at 508, including the restrictions on discovery available in Rule 26.[44] The case before us is not a case in which a plaintiff seeks to impugn an otherwise legitimate official action by casting bare accusations of malice, bad faith, and retaliatory animus. Kinney and Hall showed the district court sufficient evidence, both direct and circumstantial, and much of which came from the defendants' own words, to raise a genuine issue of fact as to their claims.

The Police Officials' conduct, as presented in the summary judgment record and viewed in the plaintiffs' favor, was objectively unreasonable in light of clearly established First Amendment law. The district court therefore correctly determined that the Police Officials are not entitled, at least at this point, to qualified immunity from Kinney's and Hall's § 1983 claims alleging violations of their rights to freedom of speech under the First and Fourteenth Amendments.

VII. DUE PROCESS AND STATE LAW CLAIMS

In addition to their § 1985 and First Amendment claims, Kinney and Hall also alleged a denial of due process and a state law claim for tortious interference with business relations. The district court denied the defendants' motion

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44. Indeed, several of the defendants in the instant case moved the district court to limit discovery until the question of qualified immunity was resolved. The court granted the motion in part, limiting discovery to the issue of the availability of qualified immunity. Therefore, it is not precisely accurate to say, as Judge Jones does, that "all discovery is complete." Jones dissent at 5.

for summary judgment on these claims. The panel of this court that initially heard the Police Officials' interlocutory appeal reversed the district court on the due process claim, finding that Kinney and Hall had not stated a violation. The panel affirmed the district court's denial of summary judgment on the state law claim. As the issues on rehearing centered upon the § 1985 and First Amendment claims, we now reinstate those portions of the panel opinion that rule on the due process and state law claims, namely Parts IV.C and V.

VIII. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of the Police Officials' motion for summary judgment on the plaintiffs' § 1985 and First Amendment claims. We reinstate Part IV.C of the panel opinion, which REVERSED the district court's denial of summary judgment on the due process claim, and we reinstate Part V of the panel opinion, which AFFIRMED the district court's denial of summary judgment on the state law claim. We DISMISS the appeal of the cities, counties, and East Texas Police Chiefs Association for the reasons set forth in note 10 *supra*. Finally, we REMAND the case to the district court for further proceedings not inconsistent with this opinion. The Police Officials shall bear the costs of this appeal.

Appendix A

RHESA HAWKINS BARKSDALE, Circuit Judge, joined by EDITH H. JONES, JERRY E. SMITH, EMILIO M. GARZA, and EDITH BROWN CLEMENT, concurring in part and dissenting in part:

> **The privilege of absurdity; to which no living creature is subject but man only.**
>
> **THOMAS HOBBES, LEVIATHAN pt. I, ch. 5 (1651).**

Primarily at issue is qualified immunity *vel non* against § § 1983 (First Amendment) and 1985 claims. I respectfully dissent from its being denied, as well as official immunity's being denied, as a result, against the state law claim. (I concur, of course, in immunity's being granted against the Fourteenth Amendment due process claim.) Because I join Judge Jones' splendid dissent concerning the First Amendment claim, I address only § 1985.

Though well intended (as always), the majority has lost sight of the proverbial forest for the proverbial trees (as did the majority for the divided panel). First, the majority's reading of § 1985 has stretched that statute beyond all recognition; the new law it has confected leads to an absurd result. Second, it has turned its back on the fundamental, compelling reasons for qualified immunity; it ignores the discretionary element that lies at the heart of that doctrine.

With all due respect to my esteemed colleagues in the majority, it is simply nothing short of absurd to hold that the police chiefs and sheriffs are *not* vested with discretion in choosing which teachers to use (and pay) for training the

police chiefs' and sheriffs' own student-officers—the very persons the police chiefs and sheriffs are responsible for training. This cannot be the law.

I.

Recitation of the material facts brings the ultimate issue into sharp focus. In 1998, while instructors at the East Texas Police Academy (ETPA), part of Kilgore College in Tyler, Kinney and Hall testified voluntarily in a federal court action as expert witnesses supporting an excessive force claim against the Kerrville, Texas, police department. The police chiefs and sheriffs (Officers) who sent (paid for) their student-officers to ETPA for training were concerned about a conflict of interest evidenced by Kinney's and Hall's testimony; discussed that conflict with ETPA; and decided in 1998 not to send (pay for) their student-officers to Kinney's and Hall's classes. As a result, ETPA discontinued those classes because they were no longer economically feasible.

Kinney and Hall had one-year contracts with ETPA. Thinking that his contract might not be renewed, Hall resigned from ETPA to find other employment. Kinney stayed until his contract expired and then accepted a new contract in a different position with the college.

In 1999, Kinney and Hall filed this action against Officers, their respective cities and counties, and the East Texas Police Chiefs Association, claiming violation of: § 1985(2); free speech under the First Amendment and due process under the Fourteenth; and Texas law. Among other rulings on motions for summary judgment, qualified

immunity was denied Officers. A divided panel of our court reversed the qualified immunity denial for the due process claim; but it affirmed the denial for the remainder (against my dissent). *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002), *vacated and reh'g en banc granted*, 338 F.3d 432 (5th Cir.2003).

II.

At issue is *qualified immunity* (interlocutory appeal), *not* the merits (appeal from final judgment). Restated, this appeal concerns only whether now, or when Officers acted in 1998, their *alleged* conduct was proscribed by law. The answer is "no"; qualified immunity must be granted.

Our standard of review for qualified immunity interlocutory appeals requires us to accept the *facts* in the light most favorable to Plaintiffs. But, of course, that standard does not require us to accept Plaintiffs' contentions on points of law. For an interlocutory appeal from the denial of qualified immunity, we have jurisdiction to accept the facts as assumed by the district court and determine whether, as a matter of law, they preclude qualified immunity. *E.g., Aucoin v. Haney*, 306 F.3d 268, 272 (5th Cir. 2002) (quoting *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472 (5th Cir. 1996)). Applying that standard to this record, we must hold, *as a matter of law*, that Officers are entitled to qualified immunity.

Section 1985 makes it unlawful to, *inter alia*, "injure [a] party or witness in his . . . property on account of having . . . testified [freely and truthfully in a court of the United States]". 42 U.S.C. § 1985(2). In denying qualified immunity

for the § 1985 claim, the majority holds: (1) the statute applies to expert witnesses; and (2) Officers' choosing to send (pay for) their student-officers to teachers other than Plaintiffs is a requisite injury to property under the statute. In so doing, the majority has lost sight of the well-known purpose for qualified immunity—to protect government officials in their *discretionary* actions, the illegality of which is *not* apparent. Accordingly, government officials are liable individually for their conduct "only if they reasonably can anticipate when [it] may give rise to liability for damages". *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Again, the ultimate issue for this interlocutory appeal is whether Officers could reasonably anticipate in 1998 that their alleged conduct could give rise to § 1985 liability. In straying from the proper inquiry, the majority has undercut the very reason for qualified immunity—the discretion that lies at its heart.

Under the well-known, two-step inquiry for deciding such immunity, the first asks whether, under current law, a valid claim has been asserted—whether a right has been violated. *E.g., Siegert v. Gilley*, 500 U.S. 226, 232 (1991). "[I]f no [such] right [has] been violated [,] . . . there is no necessity for further inquiries concerning qualified immunity". *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see, e.g., Hare v. City of Corinth, Miss.*, 135 F.3d 320, 325 (5th Cir. 1998).

Only if a valid claim has been asserted is the second step taken: was defendants' conduct objectively unreasonable under then existing clearly established law. *Hare*, 135 F.3d at 326. Of course, for this interlocutory appeal, as discussed *supra*, the issue of fact on whether Officers' conduct in 1998

was objectively unreasonable under then existing law is not at issue for this second step; we can consider only an issue of law—whether the law underlying the claimed violation of § 1985 was clearly established at the time of that conduct in 1998. Plaintiffs fail the first step; they do not assert a claim under § 1985—for several reasons, it does not apply to expert witnesses' claims of the type made in this action concerning Officers' conduct. That ends the inquiry. In the alternative, the law underlying the claimed violation of § 1985 was not clearly established when Officers acted in 1998. For purposes of demonstrating why qualified immunity is compelled, this two-step analysis will be applied twice: first, for examining why the statute does not apply to Plaintiffs *qua* expert witnesses (part A.); second, for examining why Officers' conduct is not subject to the statute (part B.).

A.

In holding against qualified immunity, the majority improperly expands § 1985 by holding that expert witnesses may bring the claim at issue here if they are injured on account of their testimony. We cannot read § 1985(2) so broadly; Plaintiffs *qua* expert witnesses cannot assert this claim. In the alternative, we cannot hold that this right for expert witnesses—now newly created by our court for this case (year 2004)—was clearly established when Officers acted in 1998.

1.

First, Plaintiffs do not assert a valid claim under § 1985—it does not apply to the post-testimony economic claim made concerning their expert testimony. It is true that expert

witnesses have been used for hundreds of years; on the other hand, the professional expert witness who profits considerably from such testimony is a recent development. *E.g.*, Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1411 (1995) (discussing growing industry of individuals who spend substantial portions of their time testifying or consulting with litigants and even advertise their services). Congress could never have envisioned protecting against loss of income for this type of testimony when it enacted § 1985 in 1871. Even assuming, *arguendo*, the majority is correct in holding that § 1985's plain meaning encompasses the claim by these expert witnesses, *Maj. Opn.* at 351-52, this is not necessarily determinative. Even where a statute's meaning is plain, "we may depart from its meaning . . . to avoid a result so bizarre that Congress could not have intended it". *Moosa v. INS*, 171 F.3d 994, 1008 (5th Cir.1999)(internal quotation marks omitted). This is just such an instance.

By enacting § 1985, Congress intended, *inter alia*, to protect those who testified in federal court and were integral to the proper functioning of those courts, not to provide a post-testimony, economic loss claim of the type at issue here for expert witnesses. Even allowing for the salutary "broad sweep" of Reconstruction-era civil rights statutes, *Maj. Opn.* at 28, the majority has stretched § 1985 much too far. The reading it accords § 1985 leads to an absurd result, as evidenced by the following examples.

Expert witnesses are quite necessary to litigate certain claims (including, in some instances, those for excessive force); but such experts are readily available—to say the least.

For example, for an excessive force claim, there may be only a few fact witnesses who can testify about the force used, but there are countless experts who can opine on whether it was excessive. Such fact witnesses are of the utmost importance; they may be able to offer the only independent evidence about what force was employed. Moreover, a fact witness is usually under subpoena and, therefore, has no choice about whether to testify. Accordingly, there are compelling reasons to give fact witnesses a high level of protection against an injury to them or their property on account of their federal court testimony.

Obviously, the same policy considerations are not in play in protecting expert witnesses. Given their abundance and other factors bearing on their status, they are not obligated to testify in a particular case. An expert should not be given the additional protection of a private right of action if adverse economic consequences flow from his testimony.

It is true, for example, that we do not distinguish between fact and expert witnesses for claims that witnesses were intimidated in a criminal trial. As another example, we do not distinguish between fact and expert witnesses in cases involving the absolute immunity that protects them from civil liability arising from their testimony. Those matters involve the integrity of the underlying action; accordingly, we cannot permit expert witnesses to be intimidated into changing their testimony any more than we can permit that for fact witnesses; all must testify freely and truthfully.

On the other hand, a § 1985 claim of the type at issue concerns providing a remedy for an expert witness who

suffers post-trial economic injury. In other words, the claim protects an expert witness' interests after he has freely and truthfully given his testimony. In many respects, however, testifying as an expert is a business; such witnesses are able to weigh the economic benefits and risks of their testimony before agreeing to testify. Therefore, expert witnesses who *choose* to testify in a case (and are usually paid to do so, often quite handsomely) should not be able to avail themselves of § 1985 later, if adverse economic consequences flow from their testimony.

Consider the wide-ranging, truly absurd results arising out of extending § 1985 to cover post-testimony economic injury to expert witnesses of the type claimed here. Arguably, every person who testifies as an expert and is later denied employment could file an action under § 1985 against the would-be employer. For example, assume an urban planner routinely testifies in litigation against cities. Is a city now subject to § 1985(2) liability if it refuses to hire that person if he applies for a job in its planning department? The majority's permitting expert witnesses to bring claims under this statute for such injury opens the door (perhaps the proverbial floodgates) for this type claim.

2.

As noted, even if an expert witness is protected under the statute for the claim at hand, a claim could be asserted only if it arose from conduct occurring *after* the date we render our decision for this appeal; in other words, the majority has confected a new claim. Accordingly, for the second step of the qualified immunity analysis, it was not

clearly established at the time of Officers' *conduct in 1998* that expert witnesses are protected under § 1985 through a claim of the type at issue here.

In fact, as the majority admits, *Maj. Opn.* at 30, it appears that only one opinion (Second Circuit) had ever applied the statute to experts; this was done without analysis and concerned a claim for *preventing* testimony—a far cry from this case. *Chahal v. Paine Webber*, 725 F.2d 20 (2d Cir. 1984). *Chahal*'s failure to specifically address expert witnesses does not imply that § 1985 obviously applies to them. On the contrary, the fact that there is only one opinion involving expert witnesses in the long history of this statute compels concluding that expert witnesses simply do not present claims under it, precisely because it does *not* apply to them.

Moreover, one Second Circuit opinion about preventing testimony could not have clearly established in Tyler, Texas, in 1998 that Officers' actions with respect to these expert witnesses could violate § 1985. It is true that, even without judicial interpretation, violation of a statute can be clearly established for qualified immunity purposes. This is not such an instance; the very questions at issue about application of § 1985(2) to economic injury for expert witnesses compel holding, for qualified immunity purposes, that, when Officers in Tyler, Texas, acted in 1998, it was *not* clearly established that their conduct could violate § 1985(2).

Appendix A

B.

Assuming, *arguendo*, that § 1985 covers expert witnesses for the claim presented in this action, Officers are still entitled to qualified immunity because the requisite "injury to property" by Officers for § 1985 liability is lacking. Therefore, Plaintiffs still fail to assert a claim; in the alternative, when Officers acted in 1998, this law was *not* clearly established.

1.

Officers' actions underlying the § 1985 claim are not the kind proscribed by the statute. For the majority to hold otherwise is to stretch § 1985(2) beyond all recognition.

a.

Regardless of Officers' reasons for doing so, electing in 1998 not to enroll (pay for) their student-officers in a class cannot be the requisite injury to property violative of § 1985. *Haddle v. Garrison*, 525 U.S. 121 (1998), is not to the contrary. The fact that, under *Haddle*, a plaintiff has a § 1985 claim for interference with at-will employment does not compel holding that Officers' choice in 1998 not to enroll student-officers in Plaintiffs' classes is an injury under the statute. Plaintiffs' status as at-will employees is irrelevant, because sending student-officers to teachers at ETPA other than Plaintiffs is not a cognizable injury under § 1985.

In *Haddle*, the Supreme Court analogized to tort law claims concerning interference with economic relationships

and held that third-party interference with at-will employment can constitute an injury under § 1985. *Id.* at 126. The Court defined tortious interference with economic relations as "maliciously and without justifiable cause induc[ing] an employer to *discharge an employee*, by means of false statements, threats or putting in fear". *Id.* (quoting 2 T. COOLEY, LAW OF TORTS 589-591 (3d ed. 1906)) (emphasis added). The majority states that, "*according to the district court,* [Officers] . . . *tried* to have the plaintiffs fired from their jobs", *Maj. Opn.* at 353 (emphasis added); but, in the next breath and quite contrary to our limited standard of review, the majority greatly overstates Officers' "trying" conduct by equating it with "coercing an employer into firing an employee", *id.* Trying to coerce an employer into firing an employee is *not* tortious interference with employment. Rather, as the majority concedes, *id.*, the "classic case" for such interference (as evidenced by all cases cited both by the majority and this dissent, including *Haddle*) concerns a plaintiff's being *actually discharged*. Kinney was not discharged; Hall resigned of his own volition; and neither claims he was constructively discharged. Therefore, Officers' conduct does not constitute an injury to property under tort law or § 1985(2).

For qualified immunity purposes here, and if we analogize to tort law, refusing to enroll (pay for) student-officers in a class does not equate with "maliciously inducing" an employer to discharge an employee. A typical case of such tortious interference with economic relations would involve a defendant's demanding that a plaintiff be fired, or telling lies about him in order to have him fired, followed by the employee's being fired. *E.g., Ahrens v. Perot*

Systems Corp., 205 F.3d 831, 836 (5th Cir.) (discussing in judicial estoppel context plaintiff's earlier claim that she had been fired because defendants tortiously interfered with her employment by revealing confidential and disparaging information about her), *cert. denied*, 531 U.S. 819, 121 S.Ct. 59, 148 L.Ed.2d 26 (2000); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex.1989) (upholding finding tortious interference because defendant *directed* plaintiff's employer to fire him).

It is simply not the law that the refusal to enroll (pay for) student-officers (regardless of Officers' motive) is the kind of interference actionable under tort law, especially for § 1985.

b.

While the analogy to tort law is instructive, the purpose and history of § 1985 also compel holding that Plaintiffs do not assert a claim. The Supreme Court noted in *Kush v. Rutledge*, 460 U.S. 719, 727 (1988), that "[p]rotection of the processes of the federal courts was an essential component of Congress' solution [via § 1985 enacted in 1871] to disorder and anarchy in the Southern States". When it enacted § 1985 in an effort to protect such processes, Congress cannot possibly have intended a scenario akin to compelling Officers' to enroll (pay for) their student-officers in Plaintiffs' classes. Allowing Officers to decide who teaches their student-officers, even if motivated by Plaintiffs' expert testimony, is hardly the type of "disorder and anarchy" that Congress was addressing in 1871. Although the statutory language of § 1985 is broad, it cannot be read so broadly as

to encompass Officers' actions—especially where, as here, the issue is qualified immunity, *not the merits*. To so read § 1985 is, again, to give it an absurd result and to create new law. The majority's comments concerning *Kush*'s rejection of a racial animus requirement for certain § 1985 claims, *Maj. Opn.* at 352 n.14, are irrelevant to our conclusion that Plaintiff's injury is not cognizable under the statute. Instead, *Kush* elucidates that allowing a claim based on Officers' choice not to enroll their students in classes produces an absurd result in the light of the Congressional goal for § 1985(2)—protecting the processes of the federal courts.

The majority tries to limit its holding by stating that "the statute does not create liability for every adverse action taken against a witness after the witness testifies in a federal case", because of the limiting principle in § 1985 that the injury must be "on account of his having so attended or testified". *Maj. Opn.* at 36. The majority pays lip service to the other important limiting principle contained in § 1985—that the adverse action taken against the witness be an "injury to property". Even assuming that Officers acted "on account of" Plaintiffs' testimony, Officers' choice to enroll (pay for) their student-officers in other instructors' classes is *not* the requisite injury to property.

The majority would allow any reaction to a witness' testimony to be actionable if it were in response to that testimony. This is too broad. The statute limits actionable responses to those that injure the witness' property. Although interference with at-will employment is such an injury, choosing not to enroll (pay for) student-officers in a particular class, is not. Plaintiffs do *not* assert a claim. Accordingly, our inquiry should stop at step one.

Appendix A

2.

In the alternative, taking the second step for qualified immunity analysis only makes it more evident that Officers are entitled to qualified immunity. Surely, this step compels awarding it. Again, this step involves deciding whether Officers' conduct in 1998 was objectively unreasonable in the light of then *clearly established* law. *Hare*, 135 F.3d at 325. As discussed, and for this interlocutory appeal, we are concerned only with an issue of law—whether the law was *clearly established* when Officers acted in 1998; we are *not* concerned with an issue of fact—whether Officers' conduct in 1998 was objectively unreasonable in the light of then existing clearly established law.

Officers stopped sending (paying for) their student-officers to Plaintiffs' classes in October 1998. Despite the majority's take on this, *Maj. Opn.* at 353-56, *Haddle*'s being decided two months later in December did not clearly establish that Officers were then (or later) violating § 1985(2). Moreover, *Haddle* was decided after Kinney's and Hall's classes were removed in November from the schedule. The majority contends that Officers acted in furtherance of the conspiracy after December because they "continued to prohibit their officers from enrolling in Kinney's or Hall's classes", *Maj. Opn.* at 354; but Officers could not have prohibited enrollment in classes that were not on the schedule. The majority's continuing conspiracy theory attempts to obscure the obvious—it was not clearly established when Officers acted in 1998 that their actions violated the statute. In addition, *Haddle* gave no indication, *nor has any other case,* that an act as benign as Officers' sending (paying for)

their student-officers to different teachers at a police academy is an injury to property under § 1985(2).

III.

The ultimate issues for this interlocutory appeal are whether Plaintiffs assert a valid claim; and, only if so, whether that law was clearly established when Officers acted in 1998. Plaintiffs do not assert a § 1985 claim; moreover, given the majority's extreme extensions of existing § 1985 law needed in order to hold against qualified immunity, it is obvious that the law now confected by the majority was not clearly established when Officers acted in 1998.

Therefore, qualified immunity must be awarded against the § 1985 claim. For the reasons stated by Judge Jones, it must also be awarded against the First Amendment claim. Finally, as a result and for the reasons stated in my dissent from the panel opinion, 301 F.3d at 296, official immunity must be awarded against the state law claim.

Accordingly, I respectfully dissent from not granting immunity against those claims.

Appendix A

EDITH H. JONES, Circuit Judge, with whom JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA and EDITH BROWN CLEMENT, Circuit Judges, join, Concurring in Part and Dissenting in Part:

With all due respect to our colleagues, one of Judge Barksdale's opening statements puts this case in perspective:

> [I]t is simply nothing short of absurd to hold that the police chiefs and sheriffs are not vested with discretion in choosing which teachers to use (and pay) for training the police chiefs and sheriffs' own student-officers—the very persons the police chiefs and sheriffs are responsible for training. This cannot be the law.

In holding otherwise, as he says, the majority "has turned its back on the fundamental, compelling reasons for qualified immunity; it ignores the discretionary element that lies at the heart of that doctrine." The majority has rendered a very un-balanced analysis of the balancing tests required in this case. This portion of our dissent will address the qualified immunity claim of the police officials as it relates to the teachers' claims for First Amendment retaliation. Judge Barksdale's portion of the dissent discusses the police officials' potential liability for violating 42 U.S.C. § 1985 and their corresponding immunity claim.

I. Background

To set the stage for the police officials' actions against Kinney and Hall, it is useful to recount undisputed facts

concerning their expert testimony and the officials' concerns. They agreed, without following ETPA instructions to obtain prior approval, to become paid experts in 1997 on behalf of the plaintiffs in *Gonzales v. City of Kerrville.* A year later, at trial, the Kerrville newspaper reported that eyewitnesses testified the suspect had fired in excess of forty shots while standing on the Guadalupe River Dam hitting objects including an apartment window, a garbage can and a patrol car window. The defendant police sniper testified that he first told the suspect to drop his rifle, and when the suspect lifted the rifle and pointed it at him, the officer killed the suspect in self-defense. Kinney's and Hall's expert conclusions were that the sniper's failure to apply his training and defendant, City of Kerrville's lack of a proper policy were proximate causes of the tragic shooting and that the sniper's use of deadly force amounted to excessive force.

Rejecting these expert opinions, the jury found in favor of the Kerrville police officer, and the federal district judge overturned the award against the city. After Kinney's and Hall's opinion was rejected, the take-nothing judgment was affirmed by this court on appeal. *See Gonzales v. City of Kerrville,* 205 F.3d 1337 (5th Cir. 1999).

The police officials have deposed or attested, inter alia, that appellees' expert testimony hurt the close working relationship required between academy instructors and representatives of the cities and counties; damaged teamwork required among those involved in training officers; threatened the confidentiality of information city and county officers share with Kinney and Hall about their procedures and

practices; undermined feelings of loyalty and confidence; and represented an improper use of the instructors' affiliation with ETPA.

II. Standard of Review

While the majority correctly cites the general standards of review for summary judgment and qualified immunity appeals, they repeatedly mischaracterize the court's function in free speech cases and thus would send to the jury issues that it is our obligation to decide. This case is, we are agreed, governed by the balancing test framed by the Supreme Court in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 1734-35 (1968), and refined and extended by *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), and *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342 (1996). The relevant issues are: (1) whether an employee's or contractor's speech constituted a matter of public concern; (2) whether the public employer's legitimate countervailing government interests outweigh the value of the protected speech; (3) whether the protected speech was a substantial or motivating factor in the discipline or termination; and (4) whether the employer would have acted against the employee for some other conduct regardless of the speech. *See Umbehr*, 518 U.S. at 675, 116 S.Ct. at 2347. The first two issues are matters for the court to decide de novo while the last two may comprise jury issues. *See Williams v. Seniff*, 342 F.3d 774, 782 (7th Cir. 2003); *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir.1989). Courts, not juries, determine the extent of protection accorded to First Amendment conduct as matters of policy and uniformity. *Melton*, 879 F.2d at 713 (concluding

that "the trial court improperly submitted to the jury the question of whether [the plaintiff's] speech was constitutionally protected").

The majority, unfortunately, appears to have confused the second and third issues and thus would leave to the jury the fundamental question of First Amendment protection that is ours to decide. The majority holds that because a fact dispute exists as to whether Kinney and Hall were "blackballed" or "boycotted" to enforce a "code of silence" (the third *Pickering* issue), this court may not take into account the police officials' proffered institutional reasons for disenrolling their officers from appellees' classes (the second issue). The majority reasons because it must give Kinney and Hall the benefit of drawing all inferences in their favor on summary judgment review, a trial is required to determine the legitimacy of the governmental interests. The weight those interests receive in the *Pickering* balance is, however, for this court to decide. Accordingly, sending to the jury issues crucial to the *Pickering* balance would be improper.

That this court alone decides the *Pickering* balance is reinforced by several facts. First, all discovery is complete, and there is no real dispute about the operative facts. Second, whether one characterizes the police officials' actions as merely "disenrolling" students from appellees' classes or as "blackballing" or "boycotting" the instructors is a matter of semantics, not motive. Third, there is no evidence that the officials themselves used the term "blackball" or "boycott" to describe their actions; those pejoratives were used by ETPA President Holda and pervade the appellees' complaint and

the district court opinion. Finally, the majority opinion itself concludes that the police officials advanced no legitimate interests to place in the *Pickering* balance, and it freely evaluates the disputed evidence. *See, e.g., Kinney v. Weaver,* __ F.3d __, (footnotes 3, 4, 25) (5th Cir. 2002) (en banc). In other words, while purporting to rest on the existence of disputed fact issues, the majority has rendered its conclusion on the first and second *Pickering* issues listed above. The majority's *de facto* balancing is additionally undermined, not only by its failure to take the entire record into account, but by its erroneous requirement that the police officials prove actual disruption, to the exclusion of potential disruption, caused in their departments by the protected speech. The Supreme Court has held, to the contrary, that an employer's legitimate concern about *potential* disruption arising from protected speech is entitled to deference. *Umbehr,* 518 U.S. at 676, 116 S.Ct. at 2348 (recognizing that the Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech") (citations and quotations omitted).

The majority's miscalculation of *Pickering* balancing necessarily affects its conclusion on qualified immunity, as the majority reiterates that there are *no* legitimate governmental interests on the police officials' side of the balance.

Unlike the majority, we neither wash our hands of the crucial responsibility to determine the extent of protection owed to Kinney's and Hall's voluntary expert testimony, nor obscure the *Pickering* determination with erroneous or unsupported fact issues. Thus, while deferring balancing at

this point, we must acknowledge the existence of legitimate governmental interests on the police officials' side.

III. Qualified Immunity

The doctrine that confers qualified immunity from suit on public officials performing discretionary functions is not an "insignificant aberration." *See Pierce v. Smith,* 117 F.3d 866, 882 (5th Cir. 1997). For over twenty years, the Supreme Court has explained that qualified immunity strikes a balance between providing redress to individuals for abuses of public office and protecting society against claims that "frequently run against the innocent as well as the guilty[.]" *Harlow v. Fitzgerald,* 457 U.S. 800, 814, 102 S.Ct. 2727, 2736 (1982). Society bears the cost of unfounded lawsuits in "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* There is also the "danger" that "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.* (citation and quotation omitted).

For these reasons, qualified immunity shields discretionary official conduct to prevent lawsuits that do not allege violations of clearly established constitutional law of which a reasonable person would have known. *Harlow,* 457 U.S. at 819, 102 S.Ct. at 2739. The standard of conduct embodies objective legal reasonableness. So measured, qualified immunity affords "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096

(1985). To disentitle public officials to qualified immunity, the unlawfulness of their conduct "must be apparent," *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987), and "all reasonable officials would have realized the particular challenged conduct violated the constitutional provision sued on[.]" *Pierce,* 117 F.3d at 871 (citations omitted). Indeed, if "officers of reasonable competence could disagree on th [e] issue, immunity should be recognized." *Malley,* 475 U.S. at 341, 106 S.Ct. at 1096. The law is clearly established only where "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 2156 (2001) (emphasis added).

No doubt, the test of objective legal reasonableness does not always require immunity in the absence of an identical or even "materially similar" case to guide official conduct. *See Hope v. Pelzer,* 536 U.S. 730, 741, 122 S.Ct. 2508, 2516 (2002). In *Hope,* the Court held that Alabama prison officials could have readily inferred from pre-existing authority that it was unconstitutional to chain recalcitrant prisoners painfully and long to a "hitching post." *Id.* As a context-specific denial of qualified immunity, *Hope* does not spring eternal for Kinney and Hall. The contrasts between the two cases are plain.

First, the Eighth Amendment proscribes "unnecessary and wanton infliction of pain" on prisoners, *Whitley v. Albers,* 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1986). With only two paragraphs of discussion, the Court in *Hope* found in the prisoner's allegations an "obvious" Eighth Amendment violation. *Hope,* 536 U.S. at 741, 122 S.Ct. at 2516. In this

case, however, rather than dealing with an "obviously cruel" practice (*compare Hope,* 536 U.S. at 745, 122 S.Ct. at 2518), the court confronts a First Amendment protection of free speech that is not unequivocal; courts must accommodate the public interest in effective provision of government services when the speaker works for or on behalf of the government. No rigid rule of liability exists. *See Pickering,* 391 U.S. at 568, 88 S.Ct. at 1734-35. Thus, the majority requires well over 20 pages of legal reasoning to explain why the police officials could not constitutionally disenroll their students from Kinney's and Hall's classes.

Just as the governing constitutional standard in *Hope* was simpler, so was the determination that the law was clearly established. An earlier circuit court case had specifically held unconstitutional, inter alia, the practice of handcuffing prisoners to "the fence and to cells for long periods of time. . . ." *Gates v. Collier,* 501 F.2d 1291, 1306 (5th Cir.1974).[45] Another case had held it unconstitutional to deny water to a prisoner as punishment for his refusal to work, explaining that conduct which jeopardizes the prisoner's health or inflicts physical abuse after he stops resisting authority is actionable. *Ort v. White,* 813 F.2d 318, 325 (11th Cir.1987). Finally, a Department of Justice report to Alabama authorities condemned exactly the corporal punishment at issue in *Hope.*

Despite the majority's creative review of Fifth Circuit government employee free speech precedents, none of our

45. As the Supreme Court noted, cases decided by the Fifth Circuit before the split that created the Eleventh Circuit remain binding in the Eleventh Circuit.

cases had remotely conducted the free speech balancing inherent in the relation between law enforcement departments and police academy instructors. As will be seen, the only related authorities were decided outside this Circuit and uniformly denied liability or granted immunity.

Thus, that "fair warning" could be given to the prison officials in *Hope* does not modify the general test for qualified immunity applicable in this case. As the Court acknowledged, "in some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Hope,* 536 U.S. at 741-42, 122 S.Ct. at 2516 (quoting *United States v. Lanier,* 520 U.S. 259, 269, 117 S.Ct. 1219 (1997)) (internal citations and quotations omitted). Nor did *Hope* cast doubt on the Court's decision that to determine whether the law is clearly established, public officials should consider controlling cases in their own jurisdiction or, alternatively, refer to a consensus of persuasive authority outside it. *Wilson v. Layne,* 526 U.S. 603, 617, 119 S.Ct. 1692, 1700 (1999).

Only recently, this Court expressed en banc our caution toward denying qualified immunity in novel factual cases. In *McClendon v. City of Columbia,* 305 F.3d 314, 332 (5th Cir. 2002) (en banc), the author of today's majority opinion found it compelling that no court in 1993 had applied the state-created danger theory of § 1983 liability to a similar factual context. This court held that "qualified immunity should be granted 'if a reasonable official would be left uncertain of the law's application to the facts confronting him.' " *Id.* at 332 (quoting *Salas v. Carpenter,* 980 F.2d 299,

311 (5th Cir.1992)) (other citation omitted).[46] Further, despite the adoption of the state-created danger theory of liability by nearly all other circuit courts at the time of the conduct in question, this court denied that they comprised a consensus of cases of persuasive authority sufficient to provide "fair warning," because the constitutional right was not defined with "sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct." *Id.* at 332-33. This court concluded that:

> The fact that the state-created danger theory was recognized at a general level in [other courts'] precedents did not necessarily provide Officer Carney with notice that his specific actions created such a danger. . . . [T]his is not a situation where "a general constitutional rule already identified in the decisional law . . . appl[ied] with obvious clarity to the specific conduct in question."

Id. (internal citation and quotation omitted). *McClendon* then states: "Indeed, general principles of the law are less likely to provide fair warning where, as here, applicability of the doctrine is highly context-sensitive." *Id.* at 332 n.13 (citation omitted).

As the foregoing authorities suggest, for immunity purposes, the question "is not whether other reasonable or

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46. Likewise, there is no case in this circuit that denied qualified immunity under the circumstances presented here. The majority's failure to point to such a case is persuasive evidence that these officers were "uncertain of the law's application to the facts confronting [them]." *Id.*

more reasonable courses of action were available" to public officials. *See Pierce,* 117 F.3d at 883. Immunity shields officials so long as their conduct is reasonable, even though wrong in hindsight. *Saucier,* 533 U.S. at 205, 121 S.Ct. at 2158. The question here is whether, among police chiefs and sheriffs similarly situated to the appellants, "all but the plainly incompetent" would have realized at the time that what they did violated Kinney's and Hall's First Amendment rights to testify voluntarily as expert witnesses. *Pierce,* 117 F.3d at 883 (citing *Hunter v. Bryant,* 502 U.S. 224, 228, 112 S.Ct. 534, 537 (1991)).

To apply these principles of qualified immunity, the Supreme Court's two-step test normally begins by considering whether, on the facts alleged by the plaintiffs, any constitutional violation occurred; if a violation could be made out, "the next, sequential step is to ask whether the right was clearly established," *i.e.,* whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier,* 533 U.S. at 201-02, 121 S.Ct. at 2156.

The majority's errors become evident by inverting the process here. Consequently, let us assume arguendo that the police chiefs and sheriffs violated the First Amendment by disenrolling their students from Kinney's and Hall's classes. Assume, that is, that the appellees engaged in some level of protected speech, and *Pickering/Connick* balancing applies. The qualified immunity question is as framed by the majority:

> We must ask whether it was clearly established at the time of the Police Officials' conduct that the

> First Amendment forbade them from retaliating against Kinney and Hall, the employees of their contractor, on account of the instructors' Kerrville testimony.

Kinney, __ F.3d at __. Our answer is resoundingly that the law was *not* clearly established.

The law was not clearly established for three reasons. First, this court and seven other circuits have recognized that public officials are more likely entitled to qualified immunity when the underlying constitutional law depends on balancing tests enforced by the judiciary, and no factually similar case exists. Second, the Fifth Circuit cases relied on by the majority are critically different from this case, while other circuits' more relevant precedents either found no liability or qualified immunity for law enforcement officials. Third, in an unprecedented approach to *Pickering/Connick* balancing, the majority inflates the value of the appellees' "speech," while discounting from the balancing test the police officials' legitimate interests; no "clearly established law" supports the majority's approach.

A. Qualified Immunity and Constitutional Balancing.

At the heart of Kinney's and Hall's First Amendment claim is the case-and context-specific *Pickering/Connick* balancing test. In *Pickering* and its progeny, the Supreme Court has balanced the interest of each plaintiff as a citizen in commenting on matters of public concern against the interests of the state, as an employer or contractor, in promoting the efficiency of the public services it performs.

Id. at 568, 88 S.Ct. at 1735; *see also Connick,* 461 U.S. at 140, 103 S.Ct. at 1686. *Pickering* emphasized, however, that in view of the "enormous variety of fact situations" in which critical statements by public employees may be thought by their superiors to furnish grounds for dismissal, it was not "appropriate or feasible to attempt to lay down a general standard" for resolving free-speech claims of public employees and that it could only "indicate some of the general lines along which an analysis of the controlling interests should run." *Pickering,* 391 U.S. at 569, 88 S.Ct. at 1735. Subsequently, the Court acknowledged that the particularized balancing required by *Pickering* is difficult even for judges to accomplish. *See Connick,* 461 U.S. at 150, 103 S.Ct. at 1692. In short, "while it may have been clear since 1968 that a citizen does not forfeit First Amendment rights entirely when he becomes a public employee [or contractor], the scope of those rights in any given factual situation has not been well defined." *Benson v. Allphin,* 786 F.2d 268, 276 (7th Cir.1986).

For immunity determinations, the implications of this rule-avoiding constitutional standard seem obvious. The Supreme Court has alluded to the enhanced likelihood of granting qualified immunity in First Amendment cases:

> Even when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech), the substantive legal doctrine on which the plaintiff relies may facilitate summary judgment. . . . [T]here may be doubt as to the illegality of the defendant's particular conduct (for instance,

> whether a plaintiff's speech was on a matter of public concern).

Crawford-El v. Britton, 523 U.S. 574, 592-93, 118 S.Ct. 1584, 1594 (1998). Fifteen years ago, this court explained that:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's First Amendment rights. There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated "clearly established" constitutional rights.

Noyola v. Texas Dep't of Human Res., 846 F.2d 1021, 1025 (5th Cir.1988). *Noyola*'s "self-evident tenet of qualified immunity jurisprudence," *see Moran v. Washington*, 147 F.3d 839, 846 (9th Cir.1998), has been embraced by at least seven other circuits.[47] Even before *Noyola*, the Seventh Circuit held

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47. *Moran v. Washington*, 147 F.3d 839, 847 (9th Cir.1998) (stating that in *Pickering* balancing cases, "the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity"); *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 398 (8th Cir.1995) ("[W]hen *Pickering*[ ] . . . is at issue, the asserted First Amendment right can rarely be considered 'clearly established'. . . ."); *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (noting that only "infrequently" will the law be clearly established when a balancing of interests is involved); *O'Connor v. Steeves*, 994 F.2d 905, 917 n. 11 (1st Cir. 1993) (same); *McDaniel v. Woodard*, 886 F.2d 311, 314 (11th Cir. 1989) (quoting *Noyola* and finding qualified immunity applicable because the constitutional right

(Cont'd)

that when a constitutional rule involves the balancing of competing interests, the standard may be clearly established, but its application is so fact dependent that the "law" can rarely be considered "clearly established." *Benson*, 786 F.2d at 276. In such cases, "the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability under *Harlow [v. Fitzgerald]*." *Id. Noyola, Moran* and *Benson* express the consensus view among circuit courts.

While the majority relegates *Noyola* to a footnote, that case remains the law of this Circuit. Judge Higginbotham, for instance, cited *Noyola* when observing that, "the fact-specific balancing test of *Pickering* complicates the question of whether an act violated clear law. This is because the question is not only the clarity of the standard but its clarity in application." *Boddie v. City of Columbus*, 989 F.2d 745, 750 (5th Cir. 1993). Judge Garwood added that qualified immunity

> principles have particular force where, as here, resolution of whether the defendant's conduct violated the constitutional provision sued on is heavily dependent on a balancing or weighing

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(Cont'd)

was unclear); *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989) ("In some circumstances, the fact-specific nature of the *Pickering* balancing may preclude a determination of 'clearly established law' . . . ."), *vacated on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) (stating that the application of fact-dependent law "can rarely be considered 'clearly established' ").

> against each other of different factors according to the degree they are present in the matrix of facts constituting the particular context in which the asserted violation occurred.

Pierce, at 882. *Noyola* has been frequently cited in our court.[48]

Noyola counsels judicial reticence toward abrogating qualified immunity in government employee First Amendment cases, but it does not act as a dispensation of the duty to examine each case carefully. In several cases, after citing *Noyola*, this court has denied the defense.[49] When, as here, the First Amendment case law is dissimilar from the precedents, we must echo the caution expressed in *Noyola*, *Boddie*, *Pierce*, and among the circuits that fact-sensitive

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48. *See Keenan v. Tejeda*, 290 F.3d 252 (5th Cir.2002); *Harris v. Victoria Indep. Sch. Dist.*, 336 F.3d 343, 345 (5th Cir.1999) (on petition for reh'g) (per curiam) (specifically stating that *Noyola* "reflects the law of this circuit"); *Pierce v. Smith*, 117 F.3d 866 (5th Cir.1997); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042 (5th Cir.1996); *Vander Zee v. Reno*, 73 F.3d 1365 (5th Cir.1996); *Gunaca v. Texas*, 65 F.3d 467 (5th Cir.1995); *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir.1995); *Boddie v. Columbus*, 989 F.2d 745 (5th Cir.1993); *Caine v. Hardy*, 943 F.2d 1406 (5th Cir.1991) (en banc); *Kinsey v. Salado Indep. Sch. Dist.*, 916 F.2d 273 (5th Cir.1990), *vacated by*, 950 F.2d 988 (5th Cir.1992) (en banc); *Connelly v. Comptroller of Currency*, 876 F.2d 1209 (5th Cir.1989); *Price v. Brittain*, 874 F.2d 252 (5th Cir.1989); *Evans v. Dallas*, 861 F.2d 846 (5th Cir.1988) (per curiam); *Brawner v. Richardson*, 855 F.2d 187 (5th Cir.1988).

49. *See Harris*, 168 F.3d at 225; *Boddie*, 989 F.2d at 750; *Brawner*, 855 F.2d at 193. These cases have little bearing on the application of *Pickering* balancing here.

balancing of "the matrix of factors constituting the particular context in which the asserted violation occurred" gives particular force to an immunity defense. In such cases, "a very high degree of prior factual particularity may be necessary." *Hope*, 536 U.S. at 741, 122 S.Ct. at 2516; *see also McClendon*, 305 F.3d at 332 n. 13.

B. Finding Similar Cases for Immunity Comparison.

Against the backdrop of *Noyola* and the First Amendment balancing standards, we conclude that no reasonable police chiefs and sheriffs could have clearly understood in October, 1998 that they were violating the First Amendment by refusing to enroll their recruits in Kinney's and Hall's classes. No compelling or compellingly analogous Fifth Circuit case law gave the officials "fair warning" in this context-sensitive balancing area of constitutional law. Cases from other circuits uniformly granted extra deference to law enforcement officials' decisions.

The majority apparently overlooks the requirement that there be a higher degree of similarity between cases to satisfy the clearly established law prong of qualified immunity. The majority concedes that "our past cases do not include one that has specifically addressed retaliation against instructors at a police academy." Instead, the majority relies exclusively on ordinary whistleblower cases[50] and one case brought by a college professor who testified as an expert

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50. *Brawner*, 855 F.2d at 191-92; *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir.1988).

witness.[51] Such cases entail, however, a significantly different mix of interests for balancing purposes than the one before us.

Consider first the "ordinary" whistleblower cases. This court has consistently held that a public employee is "speaking out on a matter of public concern" when he becomes a "whistleblower" and thus complains of, or testifies against, fellow employees' misconduct or against his employer's practices. This court has protected a wide variety of whistleblower conduct, some of it emanating from within law enforcement agencies. All of these cases, however, concerned fact witnesses, employees who had personal knowledge of misconduct within their own governmental units.

In holding that ordinary whistleblower cases afford "clearly established law" for this case, the majority elides several critical distinctions. Foremost, Kinney's and Hall's testimony did not equate with whistleblower conduct. Their opinions were valuable only insofar as they correspond with someone else's account of the underlying facts. But it is the eyewitness who "blows the whistle," not the expert who simply synthesizes and interprets the factual testimony. Qualified expert testimony is fungible, not irreplaceable. The majority implies, nevertheless, that without Kinney's and Hall's expert testimony, the plaintiff in the Kerrville case

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51. *Rainey v. Jackson State Coll.*, 481 F.2d 347 (5th Cir.1973). *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987), is also cited by the majority as a case concerning an educator, but it does not involve expert testimony and protects truthful fact testimony against one's employer's interest.

would have been unable to pursue his claim. Thus the public has a special interest in receiving expert opinions. This suggestion blinks reality. Our litigious culture affords well-qualified experts in every conceivable specialty, including law enforcement practices and training. If the majority intends, not so subtly, to hint that these experts had unique credibility because of their affiliation with ETPA, their implication proves the police officials' contention: Kinney and Hall created a conflict of interest by taking advantage of their job titles in the courtroom.

Not only is the speech in whistleblower cases generically different from appellees' expert testimony, but the corresponding interests of public employers are different. This court has been unsympathetic to employer retaliation against government whistleblowers, since their unorthodox conduct may furnish the public's only protection against internal misconduct. A public employer has little, if any, legitimate interest in hiding dirty linen from the taxpaying public. The case before us is not, however, so easily pigeonholed. The police officials are not concealing misdeeds within their departments. Indeed, since the Kerrville plaintiff on whose behalf Kinney and Hall testified left court empty-handed, the police officials' "retaliation" did not ultimately stifle the exposure of wrongdoing. The majority's facile analogy with ordinary whistleblower cases is simply wrong. We have here assumed that the police officials' actions would not satisfy the *Pickering/ Connick* balancing test after careful analysis, but such a legal conclusion does not so ineluctably follow from a few citations to whistleblower cases as to "clearly establish" the guiding law.

The majority's analogy to cases involving educators is also weak. In *Rainey,* this court concluded that a college teacher's contracts were unconstitutionally breached because of his testimony as a defense expert witness in a pornography case. *Rainey v. Jackson State Coll.,* 481 F.2d 347, 349 (5th Cir.1973). Holding that the breach violated Rainey's First Amendment rights, this court did not engage in *Pickering* balancing. *Id.* at 349-50. By its nature, Rainey's testimony could not have conflicted with the interests of his employer. No countervailing employer interests were advanced by the college against Rainey's right to testify. Legally and factually, *Rainey* is a poor fit with this case.

Closer factually to the instant case is the policy of Texas A&M University (and a state legislative appropriation provision), implemented before the police officials took action directed at Kinney and Hall, that broadly forbade university employees from testifying as expert witnesses for parties adverse to the state's interests. *See Hoover v. Morales,* 164 F.3d 221, 223-24 (5th Cir. 1998). The police officials cite the policy as reflecting clearly established law in the Fifth Circuit. The majority discounts appellants' reliance, because the policies were under federal court challenge, and ultimately did not survive. We agree that *Hoover*'s context is sufficiently different as not to furnish controlling authority in support of the police officials.

By the same token, however, the majority ought to concede that *Hoover* reinforces the principle that in this context-sensitive balancing area of constitutional law, what is clearly established must be closely related factually and legally to a case at hand. Significantly, this Court in *Hoover*

"assumed that there will be occasions when the state's interests in efficient delivery of public services *will be hindered* by a state employee acting as an expert witness or consultant. . . ." 164 F.3d at 226 (emphasis added). *Hoover* concludes by stating:

> But our task in this case requires us to apply a *Pickering* case-by-case analysis, and in doing so we conclude that the expert witness rider and TAMUS policy No. 3105 are impermissibly overbroad. Our opinion does not foreclose consideration of rules and regulations aimed at limiting expert testimony of faculty members or other state employees which adhere to our First Amendment jurisprudence.

164 F.3d at 227. Unlike the majority opinion, *Hoover* does not oversimplify *Pickering* balancing and in its way lends powerful support to the officials' plea that no clearly established Fifth Circuit law condemned their actions regarding Kinney and Hall.

While the majority has strained to find that clearly established Fifth Circuit law was contrary to the police officials' conduct, they ignore or minimize, in the immunity discussion, three circuit court cases involving alleged retaliation by law enforcement agencies for non-whistleblower testimony.

The case most closely on point is *Tedder v. Norman,* 167 F.3d 1213 (8th Cir.1999), decided only a few months after the events at issue here. Tedder was the Deputy Director of

the Arkansas Law Enforcement Training Academy. After voluntarily testifying as an expert for the plaintiff in an excessive use of force case, Tedder was demoted. The Eight Circuit affirmed a summary judgment in Tedder's First Amendment lawsuit against his supervisor. The court held that:

> Testimony concerning possible misconduct of public officials is speech on a matter of public concern that warrants constitutional protection, . . . but, as the district court stated, "it is not the place for an employee of ALETA, let alone its Deputy Director to volunteer to give such testimony without a subpoena."

167 F.3d at 1215. Further, the court found a "significant threat of disruption to the relationships between the [academy] and the law enforcement agencies that it trains." *Id.* at 1215. On balancing the relevant interests, the court ruled for the defendant against Tedder's claim of unconstitutional retaliation. *Id.*

The majority would distinguish *Tedder* because the defendant there testified against an officer employed by a law enforcement agency actually trained by the Arkansas academy. The *Tedder* court never specifically emphasizes this fact, however, and it found that the testimony caused "actual disruption and potential further disruption" to the academy. *Id. Tedder* not only undercuts the majority's First Amendment analysis, but clearly supports a finding of qualified immunity. It would be a strange constitutional rule indeed that protects a public employer's adverse action against an employee for

expert testimony, but punishes the non-employer for concerns over the very same activity. Even stranger would be the denial of qualified immunity to the non-employer whose internal relations are most affected by the expert testimony, while Tedder's supervisor was granted qualified immunity. *Id.*

The majority also ignores a Third Circuit case, decided well before the events here, which exonerated a law enforcement agency that demoted one of its officers for voluntarily appearing as a character witness (for a friend's son) at a bail bond hearing. *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882 (3rd Cir.1997). In *Green*, the officer left the hearing, declining to take the stand, when he learned that the son was charged with involvement in a drug ring. The court found that the officer's decision to testify constituted First Amendment protected activity, but also that the public's interest in his voluntary court appearance is "somewhat more limited than it would be if his appearance were subpoenaed." 105 F.3d at 888 (citing cases).

Ultimately, the *Pickering/Connick* balancing test weighed in the department's favor, as an employer, because of its significant interests in protecting the department's reputation and in successfully fighting drugs and crime. The court held that "any risk of departmental injury or disruption weighs heavily under the *Pickering* balancing test." *Id. Green* thus found for the police department even though Green's supervisor had previously approved his court appearance.

For immunity purposes, *Green* is closely related contextually to the present case. *Green* attributed significant

weight to the police department's justification for its disciplinary action, and it carefully explains why not all court testimony is equivalent for First Amendment purposes. In these ways, *Green* furnishes a backdrop for the police officials' conduct just the opposite of the synthetic "clearly established law" concocted by the majority.

The third case relevant for immunity purposes was brought against an Oklahoma district attorney and agents for the Oklahoma Bureau of Narcotics and Dangerous Drugs, alleging that the rescission of an offer of employment to coordinate the DA's drug task force was based on the plaintiff's previous expert witness testimony for a murder defendant. *Worrell v. Henry,* 219 F.3d 1197 (10th Cir. 2000). The murder trial in which the would-be employee testified involved the killing of one of the narcotics bureau's agents. The court granted summary judgment for the district attorney, who was the prospective employer, but it denied summary judgment and qualified immunity to the chief narcotics bureau agent. The Tenth Circuit held that *Pickering/Connick* balancing was appropriate to evaluate the First Amendment consequences of the district attorney's refusal to hire Worrell, but it did not find *Pickering* appropriate to analyze the alleged retaliation by the non-employer, non-contractor agents of the narcotics bureau. In reaching the latter conclusion, the court acknowledged "that there may be instances in which the operations of a third party agency are so intertwined with the operations of the employing agency that the *Pickering* balancing should be applied." *Worrell,* 219 F.3d at 1212, n.3.

Worrell demonstrates that if the police officials' role is viewed through the *Pickering/Connick* lens, their claim to

immunity should be ironclad. Even if their position more closely resembles that of the narcotics bureau agents, however, they could argue that they fall under *Worrell's* caveat because their operations are closely intertwined with ETPA.

We may end this section where we began. Because this case involves constitutional balancing, the "clearly established law" must have existed at a higher level of specificity than might be required in other types of immunity cases. This is hardly an extraordinary conclusion. It follows as a negative implication from this court's en banc holding in *McClendon* that, absent controlling circuit authority, "a 'consensus of cases of persuasive authority' might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful." *McClendon,* 305 F.3d at 329. In this case, the Fifth Circuit precedents cited by the majority involve fundamental distinctions in the nature of the speech as well as the public employer's interests. While useful, such cases hardly compel the conclusion that the police officials could not properly disenroll their officers from Kinney's and Hall's classes. The majority overlooked other circuits' cases that discussed *Pickering* balancing in the specific context of law enforcement agencies and various types of testimony. Whether or not the majority would agree with the outcome of those cases, two of them predate the police officials' conduct here, and they should be regarded as constituting a consensus of persuasive authority arrayed against the majority's conclusion. At best, one must conclude that there was no "clearly established law" that gave the police officials "fair warning" of the unconstitutionality of their conduct. *See McClendon,* 305 F.3d at 332-33 (no consensus of cases

from other jurisdictions where those cases applied the constitutional rule differently and facts were insufficiently similar; qualified immunity granted to police officer).

C. Novelty in the Majority's Balancing Exercise.

The third proof of error in the majority's qualified immunity analysis arises from the way it strikes the *Pickering/Connick* balance. In October, 1998, no court had held that a law enforcement employee's right to testify voluntarily as an expert witness outweighed the interests of the agency. *See Worrell,* 219 F.3d at 1206-07 (discussing prior circuit court cases and noting that even where *Pickering* balancing favored the employee, a different result might be reached where an agency could show a disruption in its operations). And to this day, no cases have, in the law enforcement context, elevated non-whistleblower testimony so high, or rated the department's interests so low, as the majority does here. This is not to say (at this point) that the majority is incorrect, but the novelty of this balance cuts against any conclusion that "clearly established law" proscribed the police officials' conduct. The appellants' position thus resembles that of the county supervisors in *Umbehr,* whose qualified immunity was upheld on appeal while the Supreme Court approved the application of *Pickering/Connick* balancing to the relations between independent contractors and government entities. *See generally, Umbehr,* 518 U.S. 668, 116 S.Ct. 2342.

Because the majority has exaggerated the analogy between voluntary expert testimony and whistleblower testimony, it elevated Kinney's and Hall's interests in

testifying as voluntary expert witnesses to almost absolutely protected status. The majority has thus extended or partially overruled *Hoover v. Morales*, which rejected such an absolutist approach. *See Hoover*, 164 F.3d at 227. From the perspective of other circuits, too, the majority's conclusion is unprecedented. The Tenth Circuit has specifically held otherwise: "First Amendment protection of public employees' testimony is not absolute. There are instances in which government entities' interests as employers outweigh employees' interests in free expression and the policy of encouraging truthful and uninhibited testimony." *Worrell*, 219 F.3d at 1205. *Worrell* then described with approval the way in which the courts in *Green* and *Tedder* evaluated the clash between law enforcement officers' rights to testify and their agency's significant interests. *Worrell*, 219 F.3d at 1206-07. In *Green*, as noted above, the Third Circuit held that the officer's voluntary appearance at a bail hearing, although constitutionally significant, was entitled to less weight. *Green*, 105 F.3d at 888-89. The Eighth Circuit in *Tedder* also decided that the voluntariness of the deputy director's expert testimony in a police brutality case lessened its First Amendment protection. *Tedder*, 167 F.3d at 1215. No other case has ascribed to voluntary expert witness testimony like that of Kinney and Hall such elevated First Amendment status.

Likewise, in unprecedented fashion, the majority holds for naught the police officials' description of their institutional interests in controlling the education of department officers.[52] The majority's hostility toward the

52. The majority relies on two cases in concluding the appellants have *no* legitimate interests in the *Pickering* balancing. Both are (Cont'd)

police officials' position is contrary to *Waters v. Churchill,* which described the government's "significant" interest as an employer as follows:

> When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

511 U.S. 661, 675, 114 S.Ct. 1878, 1887-88 (1994). *Waters* further noted:

> [W]e have consistently given greater deference to government predictions of harm used to justify restrictions of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.

511 U.S. at 673, 114 S.Ct. at 1887. In *Umbehr,* too, the Court reminded that, "*Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests." *Umbehr,* 518 U.S. at 677, 116 S.Ct. at 2348.

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inapposite. In one of these, the policeman was disciplined for associating with a union. *See Boddie,* 989 F.2d at 747. The other involved a prison nurse's whistleblower activity. *Frazier v. King,* 873 F.2d 820, 826 (5th Cir. 1989).

Appendix A

As was previously explained, the expert testimony caused an uproar because police officials and student-officers feared Kinney and Hall might use information gleaned in their classes to testify against the sponsoring agencies; that their testimony interfered with unfettered classroom discussions; and that they misused their affiliation with ETPA to enhance their testimony. One can certainly understand the sensitivity of the police officials about Kinney's and Hall's testimony. Far from exhibiting wanton police brutality, the *Gonzales* case portrayed an officer's life endangered by a deranged shooter. Such situations are the stuff of law officers' nightmares and domestic tragedies. There is no evidence that Kinney and Hall were lawyers, and they are entitled to their professional opinions as law enforcement instructors. Nevertheless, feelings of loyalty, confidence and teamwork between the agencies and the instructors were understandably strained by this testimony. Further, it is evident that the instructors enhanced their credibility because of their association with ETPA, and that the police officials might legitimately question whether the instructors' impartiality was undermined because they initially agreed to be paid experts.

The majority might refuse to defer and throw all these institutional concerns to the winds in its First Amendment analysis. But in doing so, not only does it abuse the general cautions expressed by the Supreme Court, but it contradicts authorities from several circuits. In *Green,* the Third Circuit described as "very significant" the interests of the housing authority police department as an employer where the officer's voluntary testimony created a "risk of departmental injury based on the 'potential disruptiveness of the speech.'" (*Green,* 105 F.3d at 888, quoting *Waters,* 511 U.S. at 680, 114 S.Ct. at 1890.)

In *Tedder,* the court concluded that Tedder's testimony caused actual disruption and potential further disruption between ALETA and the law enforcement agencies that it was charged with training. *Tedder,* 167 F.3d at 1215. The court was concerned that students' loss of faith in the ALETA's Deputy Director, who had the authority to approve or veto lesson plans, could spread to every class taught there. *See id.* The Eighth Circuit has elsewhere recognized in emphatic terms the heightened interests of law enforcement agencies. *See, e.g., Shands v. City of Kennett,* 993 F.2d 1337, 1344-45 (8th Cir. 1993); *Tindle v. Caudell,* 56 F.3d 966, 971-73 (8th Cir. 1995).

In *Worrell,* the Tenth Circuit reiterated that "personal loyalty and confidence among employees are especially important in law enforcement" and noted that "[t]hese concerns are heightened in smaller offices and departments, where relatively minor disturbances in morale may create significant problems." *Worrell,* 219 F.3d at 1208. The court adds that the district attorney was not obliged to wait for an actual breakdown in the functioning of his taskforce before taking action. *Id.* at 1208-09. He was entitled to rely on reasonable predictions of workplace disruption. *Id.; see also Waters,* 511 U.S. at 673, 114 S.Ct. at 1887 (noting the "substantial weight [afforded] to government employers' reasonable predictions of disruptions").

The Seventh Circuit has repeatedly held that "'[d]eference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement.'" *Williams v. Seniff,* 342 F.3d 774, 783 (7th Cir. 2003) (quoting *Kokkinis v. Ivkovich,* 185 F.3d 840, 845 (7th Cir. 1999)).

Finally, the Sixth Circuit has held that police officials are entitled to qualified immunity for taking reasonable administrative action to preclude one of their officers from exploiting his uniform and his position in the police department to advocate on behalf of the National Rifle Association. *See generally, Thomas v. Whalen,* 51 F.3d 1285 (6th Cir. 1995). While acknowledging the protected status of the officer's political speech, the court pointed out that "no court has recognized a right to exploit one's rank in public employment solely for the purpose of enhancing credibility for personal or political gain." *Whalen,* 51 F.3d at 1291.

In addition, the majority wholly overlooks that public employers are entitled to deference in dealing with employees whose trust and loyalty are essential to the functioning of a public office. *See, e.g., Connick, supra,* 461 U.S. at 151-52, 103 S.Ct. at 1692 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."); *Kinsey v. Salado Indep. Sch. Dist.,* 950 F.2d 988, 994 (5th Cir.1992) (en banc). There can hardly be any dispute that law enforcement instructors occupy a sensitive and extremely important position with respect to the agencies' mission. If training fails because the trainees have lost confidence in their instructors and are unwilling to discuss issues frankly with them, the consequences can be disastrous. The above-cited cases specifically refer to institutional loyalty as a quality especially required in law enforcement agencies, yet the majority ignores it.

At this point, we have assumed the correctness of the majority's final conclusion that a First Amendment violation

occurred. But in its novel approach to balancing the instructors' interests against those of the law enforcement agencies, the majority is making new law, not simply expounding "clearly established law." Kinney and Hall may choose to pursue their suits against the municipal entities, but the individual defendants are entitled to qualified immunity.

IV. Was There a Violation of the First Amendment?

Although we have demonstrated that the police officials were entitled to qualified immunity regardless of whether their conduct violated the First Amendment, we would also hold that their actions were not, under the *Pickering/Connick* balancing test, unconstitutional.

Pickering "requires a fact-sensitive and deferential weighing of the government's legitimate interests." *Umbehr*, 518 U.S. at 677, 116 S.Ct. at 2348. In holding that *Pickering* balancing applies to cases in which a governmental entity appears to condition the provision of contracts on a third party's constitutionally protected expression, the Supreme Court observed that the "nuanced" *Pickering* approach, "which recognizes that a variety of interests may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees." *Id.* at 678. The Court also found it "far from clear, as a general matter, whether the balance of interests at stake is more favorable to the government in independent contractor cases than in employee cases." *Id.* at 680, 116 S.Ct. at 2350.

Appendix A

Whether Kinney and Hall are classified as third-party independent contractors or as employees is not as significant as how their overall function, and their voluntary expert testimony, affected the law enforcement agencies' performance of a public mission. *Compare Umbehr, id.* at 679, 116 S.Ct. at 2349 (noting that a bright-line rule that "would leave First Amendment rights unduly dependent on whether a state law labels a government service provider's contract" as one of employment or a contract for services is "a very poor proxy for the interests at stake"). To the extent the majority opinion depends on labeling Kinney and Hall as independent contractors rather than employees, its analysis is oversimplified and inconsistent with *Umbehr.*[53] Further, the majority's reliance on this court's cases involving government contractors is hollow, since neither the speech at issue in those cases nor the governmental interests at stake is comparable to the present case.[54]

Balancing the interests in this case on a clean slate, the appellees' testimony constituted speech on a matter of public concern and was entitled to some level of constitutional

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53. In the foregoing qualified immunity discussion, this opinion, like the majority's, necessarily focuses on government employee cases, since those are the most common. Proper *Pickering* analysis, however, balances the relevant interests without regard to labels.

54. *See N. Miss. Communications v. Jones,* 792 F.2d 1330 (5th Cir.1986) (county board retaliated against newspaper for critical editorials and stories) and *Blackburn v. City of Marshall,* 42 F.3d 1925 (5th Cir.1995) (wrecker service denied permission to use police radio frequency after complaint to police chief; no *Pickering* analysis at all).

protection. For reasons previously discussed, we, unlike the majority, do not characterize the protection as "extremely strong." Other circuits' opinions have properly distinguished voluntary testimony from testimony under subpoena. *See Green,* 105 F.3d at 888; *Tedder,* 167 F.3d at 1215. Further, voluntary expert witness testimony is distinct from standard whistleblower conduct, and on the facts of this case, Kinney's and Hall's expert opinions were not essential to exposing wrongdoing by a policeman or a police department.

The interests of the law enforcement agencies have been well-documented in other cases, where it has been held that there is a "special need for deference to the employment decisions of those responsible for insuring public safety." *Kokkinis,* 185 F.3d at 845. Law enforcement agencies have "a more significant interest than the typical government employer in regulating the speech activities of [their] employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence." *Tyler v. City of Mountain Home,* 72 F.3d 568, 570 (8th Cir.1995) (internal quotation marks and citations omitted). The police officials here deposed or attested that appellees' expert testimony hurt the close working relationship required between academy instructors and representatives of the cities and counties; damaged teamwork required among those involved in training officers; threatened the confidentiality of information officers share with their instructors about procedures and practices; undermined feelings of loyalty and confidence; and represented an improper use of the instructors' affiliation with ETPA. The police officials offered evidence of actual and potential disruption to their training programs and departments.

Two factors detract, in the majority's view, from the strength of these articulated interests and the deference they are due. First, it is contended that because appellees testified "400 miles away" from ETPA and in a case not involving a trainee or department sponsor of the ETPA program, the police officials' concerns are misplaced. The distance between Kerrville and Kilgore, Texas, is a red herring. Both cities are in Texas, both are governed by the same regime of state and federal law, and there is no showing that police officers trained in east Texas rarely or never migrate to other areas of the state, or that ETPA's influence spreads no further than the boundaries of its sponsoring department. The "400 mile argument" is disingenuous.[55]

That the expert testimony posed a conflict of interest with Kinney's and Hall's status as instructors, despite its taking place outside ETPA's formal jurisdiction, is a conclusion entitled to deference. As the majority notes, the police officials did not, in events leading up to this case, explain how they used the term conflict of interest, but the officials' ineloquence does not mean their judgment is entitled to no weight. Moreover, it is evident that in testifying before a Kerrville jury, the appellees' status as instructors at a Texas police academy would enhance their credibility and lend the prestige of ETPA to their words. By their status, the instructors necessarily implicated the sponsoring departments (despite any professional disclaimers) in the legitimacy of their expert opinions. Even if other possible standards for conflicts of interest, *e.g.*, detracting from their time available

55. We need not and do not speculate whether expert testimony given outside the State of Texas would have a different impact on the evaluation of the agencies' interests.

to prepare for and conduct ETPA classes or "double-dipping" on salary and witness fees, are excluded, a conflict existed in this sense. *See, e.g., Thomas v. Whalen,* 51 F.3d at 1292 (discussing a government entity's interest in preserving the appearance of impartiality).

More consequential is the majority's criticism that the police officials could not legitimately discipline Kinney and Hall to enforce an "unwritten code" of silence, whereby police officers do not testify against each other. We agree that enforcing the "code of silence" to stifle speech concerning police misconduct is not a legitimate governmental interest. The evidence shows, however, that this was not a contemporaneous justification formally offered for the police officials' conduct, and, in fact, reference to an "unwritten code" was made by only one of the appellants, during a television interview. As can be seen from the wealth of detail in the majority opinion, this case contained an abundance of contemporary oral and documentary evidence as well as post-litigation depositions that explored the police officials' reasons for their action. That only one reference appears throughout the record to an "unwritten code" is significant. This stray remark should not be blown out of proportion.

The dominant theme in cases that have considered the *Pickering* balance in the context of law enforcement is the need for a high degree of personal loyalty and confidence, esprit de corps, harmony and good morale within departments and between instructors and trainees. *Tedder,* for instance, relied on the interests of the actual employer, the police training academy, which has only an indirect stake in the

results of training. *Tedder,* 167 F.3d at 1215. *Tedder* reflects the even stronger interests of the officials in this case, whose departments and officers rely on the academy's training for the sake of the public. In *Worrell,* the Tenth Circuit held that a district attorney's interest in preventing disruption with other law-enforcement agencies outweighed the applicant's interest in avoiding retaliation for his testimony as an expert witness against a police officer. *Worrell,* 219 F.3d at 1208-09. In *Green,* the reputation and law enforcement capacity of the housing authority police were held to prevail over an officer's decision to testify voluntarily. *Green,* 105 F.3d at 888-89. The Seventh Circuit has on several occasions held that protected speech was subordinate to the institutional interests of law-enforcement agencies. *See Seniff,* 342 F.3d at 783-85; *Kokkinis,* 185 F.3d at 844-45.

In stark contrast to those cases, the majority here ignores the paramilitary interests of the law-enforcement agencies and reduces their "legitimate" concerns to the instructors' competence and teaching ability. As a matter of law, and based on this record, those interests are too narrowly defined.

We conclude that this is a closer case under *Pickering* balancing than others in the law enforcement area. While Kinney and Hall engaged in protected conduct, their voluntary expert testimony did not carry such a high degree of public importance, in general or in the facts of this case, as ordinary whistleblower testimony. Further, we owe special deference to the law enforcement agencies' legitimate interests in maintaining discipline, harmony, confidentiality and morale in their departments and training programs. We also note that while the police officials opined that Kinney

and Hall should be fired, they succeeded only in disenrolling their students from the instructors' classes. They did not and could not directly terminate appellees' employment.

On balance, we conclude that the police officials did not violate the First Amendment by disenrolling their students from appellees' classes. The officials have the discretion to decide, consistent with the First Amendment, by whom their officers will be taught.

V. Conclusion

For the foregoing reasons, I respectfully dissent from the denial of qualified immunity on the appellees' First Amendment claims, and I join Judge Barksdale's dissent.

Appendix A

E. GRADY JOLLY, Circuit Judge, Dissenting:

I respectfully dissent and agree with Judges Jones and Barksdale that the defendant law enforcement officers are entitled to qualified immunity and should be released from *personal* liability. It seems disingenuous to hold that the law is *clearly* established when it takes 20,467 words to explain, and when six United States Court of Appeals judges sharply disagree about it. To my way of reasoning, the majority has turned the words, and the doctrine, of "clearly established" on its head when it denies immunity in this novel case.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 9, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40557

DEAN KINNEY; DAVID HALL

Plaintiffs-Appellees

versus

BOBBY WEAVER, Etc.; ET AL

Defendants

J B SMITH, Smith County Sheriff; SMITH COUNTY TEXAS; W A "BILL" YOUNG, Tyler Police Chief; CITY OF TYLER, TEXAS; EAST TEXAS POLICE CHIEF'S ASSOCIATION; BOBBY WEAVER, Gregg County Sheriff; BOB GREEN, Harrison County Sheriff; GREGG COUNTY TEXAS; HARRISON COUNTY TEXAS RONNIE MOORE, Kilgore Director of Public Safety; CHARLES "CHUCK" WILLIAMS, City of Marshall Police Chief; TED GIBSON, Nacogdoches Police Chief; CITY OF KILGORE, TEXAS; CITY OF MARSHALL, TEXAS; CITY OF NACOGDOCHES, TEXAS

Defendants-Appellants

Appeal from the United States District Court for the
Eastern District of Texas

Appendix B

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 31, 2002, 5 Cir., 2002, __ F.3d __)

(July 9, 2003)

BEFORE: KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT and PRADO, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 31, 2002 AND REVISED SEPTEMBER 24, 2002

REVISED SEPTEMBER 24, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40557

DEAN KINNEY; DAVID HALL

Plaintiffs - Appellees

v.

BOBBY WEAVER, Etc.; ET AL

Defendants

J B SMITH, Smith County Sheriff; SMITH COUNTY, TEXAS; W A "BILL" YOUNG, Tyler Police Chief; CITY OF TYLER, TEXAS; EAST TEXAS POLICE CHIEF'S ASSOCIATION; BOBBY WEAVER, Gregg County Sheriff; BOB GREEN, Harrison County Sheriff; GREGG COUNTY, TEXAS; HARRISON COUNTY, TEXAS; RONNIE MOORE, Kilgore Director of Public Safety; CHARLES "CHUCK" WILLIAMS, City of Marshall Police Chief; TED GIBSON, Nacogdoches Police Chief; CITY OF KILGORE, TEXAS; CITY OF MARSHALL, TEXAS; CITY OF NACOGDOCHES, TEXAS

Defendants - Appellants

Appendix C

Appeals from the United States District Court
for the Eastern District of Texas, Lufkin

July 31, 2002

Before KING, Chief Judge, BARKSDALE, Circuit Judge, and SCHELL, District Judge.*

KING, Chief Judge:

Plaintiffs-Appellees Dean Kinney and David Hall brought suit against seven law enforcement officials, the seven cities or counties that employ these officials, and the East Texas Police Chiefs' Association,[1] asserting four claims: (1) a 42 U.S.C. § 1985(2) claim alleging conspiracy against Kinney and Hall because of their testimony in judicial proceedings, (2) a 42 U.S.C. § 1983 claim alleging violations of their rights to freedom of speech under the First and Fourteenth Amendments, (3) a § 1983 claim alleging violations of their Fourteenth Amendment rights to due process of law, and (4) a state law claim alleging tortious interference with business relations. The law enforcement officials now appeal the district court's order denying their summary judgment motion that asserted qualified immunity against the federal claims and state-law immunity against

* District Judge of the Eastern District of Texas, sitting by designation.

1. Originally, Kinney and Hall named an eighth official and his agency of employment as defendants, but the district court granted a subsequent agreed motion to dismiss Kinney and Hall's complaint against these two parties.

the tort claim. For the following reasons, we AFFIRM the district court's order holding that the law enforcement officials are not entitled to qualified immunity against the § 1985 claim or the § 1983 First Amendment claim, or to state-law immunity against the tort claim, and we REVERSE that court's order holding that those officials do not have qualified immunity against the § 1983 due process claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

Viewing the summary judgment record in the light most favorable to the non-moving parties, i.e., Dean Kinney and David Hall, the facts are as follows. *See Kemp v. G.D. Searle & Co.*, 103 F.3d 405, 406 (5th Cir. 1997) (setting out the facts in the light most favorable to the non-moving party in reviewing a summary judgment). At the time of the events giving rise to their claims in the instant case, Kinney and Hall were instructors at the East Texas Police Academy ("ETPA"), a division of Kilgore College in Kilgore, Texas. Founded by the East Texas Police Chiefs' Association in 1966, the ETPA provides basic and advanced training for law enforcement officers in the greater East Texas area. At the time of the events giving rise to the instant case, Kinney and Hall had been working at the ETPA for seventeen years and six years, respectively, under renewable one-year employment contracts. The law enforcement officials asserting qualified immunity in this case are chiefs of police or sheriffs who possess final authority over the training of the officers employed by their respective agencies (collectively "the Police Chiefs and Sheriffs"). Before the fall of 1998, the Police Chiefs and Sheriffs enrolled their officers in ETPA courses on a regular basis, including courses taught by Kinney and Hall.

Appendix C

In August 1998, Kinney and Hall testified as expert witnesses for the family of Edward Gonzales, a seventeen-year-old who was fatally shot by a police officer employed by the city of Kerrville ("the Kerrville case").[2] Based on their knowledge and experience as law enforcement instructors specializing in the use of force and firearms, Kinney and Hall testified that the Kerrville police officer had used excessive force and that the Kerrville police department had failed to implement the proper policies necessary to direct the conduct of officers acting as "snipers." Although Kinney and Hall made fee arrangements with the attorney who represented Gonzales's family in their wrongful death action against the officer and the city, Kinney and Hall decided shortly after they were deposed that they would decline payment. Kinney's explanation for this decision, confirmed by Hall, is that the two "felt so strongly about the incident and what had happened to Eddie Gonzales" that they concluded that "it wouldn't be right to charge."

Shortly after Kinney and Hall testified in the Kerrville case, William Holda, the president of Kilgore College, received letters from some of the Police Chiefs and Sheriffs denouncing Kinney's and Hall's expert testimony for the Kerrville case plaintiffs and threatening to stop using the ETPA for officer training. In a letter dated September 15, 1998, Kilgore Director of Public Safety Ronnie Moore[3] told

2. The Kerrville case did not involve an officer who had been trained at the ETPA or a law enforcement agency that sent students to the ETPA, as Kerrville lies outside the region of Texas from which the ETPA draws its students.

3. As director of public safety for the city of Kilgore, Moore supervised the city's police and fire departments.

Holda that he was concerned about Kinney's and Hall's recent inquiries regarding a case initiated by Kilgore's police department because "[i]t is a well known fact within this agency that these instructors had previously testified in another matter, against other Officers." Moore informed Holda that "[d]ue to these circumstances, our agency will be exploring other options to provide the professional training necessary for our Officers." In a letter dated September 29, 1998, Charles Williams, the chief of the city of Marshall's police department, also complained to Holda about Kinney's and Hall's expert testimony. Specifically, he wrote, "I think it is deplorable . . . that instructors for our Police Academy hire themselves out as an expert witness: ***AGAINST*** law enforcement agencies" (emphasis in original). Williams stated further that "[t]he Marshall Police Department will not attend any courses taught by Mr. David Hall or Mr. Dean Kinney due to the liability they place on this Police Department." Williams attached three newspaper articles that mentioned Kinney's and Hall's roles as expert witnesses for the plaintiffs in the Kerrville case.

The summary judgment evidence submitted by Kinney and Hall includes Williams's deposition, in which he testified that he learned of Kinney's and Hall's involvement in the Kerrville case when he received an envelope from an anonymous source containing the three newspaper articles that Williams attached to his letter to Holda. In addition to the articles, the envelope contained a note telling Williams to contact Moore for more information, which Williams did shortly after receiving the envelope. Williams forwarded copies of his September 29, 1998 letter and the attached articles to Moore and four of the other Police Chiefs and

Sheriffs, namely, Bill Young, the chief of police for the city of Tyler, Bob Green, the sheriff of Harrison County, Bobby Weaver, the sheriff of Gregg County, and J.B. Smith, the sheriff of Smith County. The set of documents that Williams forwarded to Young, which is in the summary judgment record, also included a copy of Moore's September 15 letter to Holda.

Young sent a letter to Holda on September 30, 1998, the day after he received the letters and articles from Williams. Young wrote, "I am greatly disturbed by the recent news that [David Hall and Dean Kinney] have acted in the capacity of 'Expert Witnesses' to testify against another law enforcement agency and it's [sic] officers." He emphasized he was "voic[ing] [his] concern, not only as Chief of Police of an agency that is one of your largest customers, but also as President of the East Texas Police Chiefs' Association." Noting that "[i]t is not our preference to have these two instructors teach our officers and also engage in legal combat with them in the judicial system," Young stated that "[t]his matter will force us to consider alternative methods to achieve our training needs if not resolved as soon as possible."

In an attempt to address these complaints, Holda met with Moore, Williams, and Young on September 30, 1998. Also in attendance were three other law enforcement officers to whom Williams had forwarded copies of his letter to Holda, including Defendant Green. In his affidavit, Holda gave an account of this meeting that was largely confirmed by Moore, Williams, Young, and Green in their depositions. According to Holda, all four men "made it clear" (1) "that it was unacceptable for Mr. Hall and Mr. Kinney to continue

as instructors of officers and recruits and also testify in litigation against police officers," and (2) "that they would no longer send officers and recruits to the [ETPA] for training if Mr. Hall and Mr. Kinney remained on the Academy faculty." Moore, Williams, and Green subsequently agreed to use the ETPA on the condition that their officers would not be instructed by Kinney and Hall, but Young continued to insist that Kinney and Hall be removed from the ETPA faculty.

Shortly after the September 30 meeting, Holda met with Kinney and Hall to apprise them of the Police Chiefs' and Sheriffs' condemnation of Kinney's and Hall's work in the Kerrville case. Kinney and Hall assured Holda that they would never testify as experts against any officer who had been trained at the ETPA or any agency that had sent officers to the ETPA for training.[4] Kinney further promised that he would not accept payment for any future work on behalf of plaintiffs in police misconduct cases. In a letter dated October 5, 1998, Holda conveyed Kinney's and Hall's assurances to the attendees of the September 30 meeting and invited them to attend another meeting along with other East Texas law enforcement officials for the purpose of discussing their concerns directly with Kinney and Hall. None of the invitees indicated an interest in such a meeting or came to the ETPA on the date suggested by Holda.

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4. Kinney and Hall made clear, however, that if compelled to testify in a case involving an officer whom they had trained at the ETPA, they would testify truthfully as to whether the officer had acted in accordance with their training.

Appendix C

On October 22, 1998, the East Texas Police Chiefs' Association held its quarterly meeting in Kilgore. The attendance was unusually large. All of the Police Chiefs and Sheriffs were present.[5] The minutes of this meeting reflect that Kinney's and Hall's involvement in the Kerrville case was prominent on the agenda. Defendants Young (who was president of the East Texas Police Chiefs' Association at the time), Williams, Moore, Gibson, and Weaver stood up and voiced their disapproval of Kinney's and Hall's work on behalf of the plaintiffs in the Kerrville case, and all five officials stated their intention to ensure that their officers were not trained by Kinney or Hall. Subsequently, the minutes state that "it was agreed that none of the Chiefs or Sheriffs present would send their officers to any classes taught by either [Kinney or Hall]."

A number of local media organizations reported on the controversy that arose out of Kinney's and Hall's expert testimony against a law enforcement officer and agency. On television and in print, Defendants Young, Weaver, Williams, and Smith are documented announcing their intention either to bar their officers from taking Kinney's and Hall's courses or to use a training institution other than the ETPA. Smith was quoted as stating that Kinney and Hall "prostituted themselves . . . in a case that did not involve them and that's wrong." Weaver told a television reporter that Kinney and Hall had violated "an unwritten code."

The Police Chiefs and Sheriffs followed through on their threat to boycott Kinney's and Hall's courses by both

5. Smith did not personally attend, but rather sent a representative.

cancelling current enrollment and disallowing future enrollment of their officers in Kinney's and Hall's courses. The summary judgment evidence indicates that this boycott was quite effective. Holda stated that Kinney's and Hall's courses "were boycotted by a sufficient number of law enforcement agencies so that enrollment was insufficient to make their classes and, therefore, could not be economically continued." The boycott began in October 1998, and by November 10, 1998, all of Kinney's and Hall's basic classes had been removed from the schedule, and many of their off-campus classes had been cancelled.

Aware that the enrollment in his courses was down and thus anticipating that his ETPA contract would not be renewed at the end of the 1998-1999 academic year, Hall resigned from the ETPA on January 3, 1999, because he was concerned that he would not be able to support his family if his compensation was substantially decreased. He was hired as a patrol officer at the Carrollton Police Department, the job he had left to work at the ETPA six years earlier.

Kinney continued working as an ETPA instructor until his contract for the 1998-1999 academic year expired on August 31, 1999. During this period, the boycott remained in effect. The ETPA double-booked all Kinney's classes on the 1999 schedule to ensure that the law enforcement agencies that refused to enroll their officers in Kinney's courses would have alternatives at the ETPA. Kinney stated in his affidavit that he "had minimal class time during the first few months of the 1999 calendar year"—specifically, he "had no time in the basic police academy and very little in the in-service classes." In their depositions taken on August 24, 25, and

26, 1999, the Police Chiefs and Sheriffs stated that they continued to prohibit enrollment either in Kinney's courses or in all ETPA courses because Kinney remained on the ETPA faculty. Kilgore College did not renew Kinney's 1998-1999 contract for his position as an ETPA instructor, but rather offered him a contract for a lecturer position in the Criminal Justice Department of Kilgore College for the following 1999- 2000 academic year. The salary for this position was $15,000 less than Kinney earned as an ETPA instructor. He had not taught in the Criminal Justice Department previously, but rather had been an ETPA instructor for the entire seventeen-year period that he had been working for Kilgore College. According to Holda, "Kilgore College did not anticipate a change in the teaching assignment for either Mr. Kinney or Mr. Hall prior to the decisions by certain law enforcement agencies to boycott classes taught by Mr. Hall and Mr. Kinney."

On April 7, 1999, Kinney and Hall filed a complaint in federal district court against the Police Chiefs and Sheriffs, their respective cities or counties of employment, and the East Texas Police Chiefs' Association, alleging that the defendants had "blackballed" Kinney and Hall "in retaliation for their truthful testimony on behalf of the victim of a police shooting." Kinney and Hall claimed that in taking such action, the defendants had violated: (1) their rights to testify freely under 42 U.S.C. § 1985(2), (2) their rights to free speech under the First and Fourteenth Amendments, (3) their rights to due process of law under the Fourteenth Amendment, and (4) Texas law. The defendants (both the law enforcement officials and the entities) moved for summary judgment on the merits of all four claims, and the Police Chiefs and

Sheriffs also asserted qualified and state law immunity defenses. The district court denied the defendants' summary judgment motion on all grounds. *Kinney v. Weaver*, 111 F. Supp. 2d 831 (E.D. Tex. 2000). The Police Chiefs and Sheriffs now appeal the district court's denial of summary judgment on their qualified and state law immunity defenses.

II. JURISDICTION OVER AN INTERLOCUTORY APPEAL OF A DISTRICT COURT'S DENIAL OF QUALIFIED IMMUNITY

We must first address our jurisdiction to hear the Police Chiefs' and Sheriffs' interlocutory appeals. Under the collateral-order doctrine, a denial of summary judgment based on qualified immunity is immediately appealable as a "final decision" under 28 U.S.C. § 1291 (1994)[6] "to the extent that [such a denial] turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). To deny a summary judgment motion based on qualified immunity, a district court must determine both (1) that certain conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and (2) that a genuine issue of fact exists regarding whether the defendant engaged in such conduct. *See Colston v. Barnhart*, 146 F.3d 282, 284 (5th Cir. 1998) (on petition for rehearing en banc). The latter conclusion is not immediately appealable, as "such conclusions are nothing more than a determination of the sufficiency of the evidence—a finding which, in turn, is not

6. Section 1291 provides that ' [t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291.

truly separable from the underlying claim and thus is not a 'final order' under the collateral order doctrine." *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 634 (5th Cir. 1999); *see also Johnson v. Jones*, 515 U.S. 304, 313 (1995) (holding that "the District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning [whether the officials engaged in the conduct alleged by the plaintiff] was not a 'final decision' within the meaning of [28 U.S.C. § 1291]"). Rather, on interlocutory appeal we may review only the purely legal question whether the plaintiff alleges a violation of a clearly established right of which a reasonable person would have known. *See Johnson*, 515 U.S. at 313, 319; *Mitchell*, 472 U.S. at 528 n.9. Accordingly, "we can review the *materiality* of any factual disputes, but not their *genuineness*." *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000). "In making this legal determination on the materiality of the facts at issue, we review the complaint and record to determine whether, assuming that [the plaintiff's version of the facts is] true, those facts are materially sufficient to establish that [the] defendants acted in an objectively unreasonable manner [in light of clearly established law]." *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 341 (5th Cir. 2001) (citation and internal quotations omitted).

Kinney and Hall assert that we are without jurisdiction to consider an interlocutory appeal of the district court's order denying qualified immunity because the court based that order on its determination that genuine issues of fact exist as to whether the Police Chiefs and Sheriffs boycotted Kinney's and Hall's courses in retaliation for their truthful testimony in the Kerrville case. However, the district court's denial of

summary judgment was also based on the court's conclusion that such a boycott violated Kinney's and Hall's clearly established rights. *See Kinney*, 111 F. Supp. 2d at 837, 840-43. The Supreme Court has made clear that appellate review of *that* conclusion is not precluded by the fact that the district court also determined that the record establishes genuine issues of fact as to whether the conduct in question occurred. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (reaffirming that a government official may "claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness'").

As the Police Chiefs and Sheriffs point out, for purposes of this appeal, they do not challenge the district court's determination that there is a genuine issue of fact regarding whether they engaged in the conduct attributed to them by Kinney and Hall. Rather, the Police Chiefs and Sheriffs challenge only that court's determination that such conduct was objectively unreasonable in light of law that was clearly established at the time of the alleged violations. Thus, we have jurisdiction over the Police Chiefs' and Sheriffs' interlocutory appeals of the district court's order denying them qualified immunity.[7]

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7. Although the briefs submitted by both parties in this case address only the issue whether the district court properly denied the Police Chiefs' and Sheriffs' claims of qualified immunity in their summary judgment motion, the notices of appeal filed with this court name not only the Police Chiefs and Sheriffs, but also the cities, counties, and the East Texas Police Chiefs' Association. Of course, the doctrine of qualified immunity applies only to officials, and thus

(Cont'd)

Appendix C

III. STANDARD OF REVIEW

We review de novo a district court's denial of a summary judgment motion, including those based on qualified immunity. *Chiu*, 260 F.3d at 342. As discussed above, we have jurisdiction to review interlocutory appeals from a denial of qualified immunity only to the extent that the denial turns on purely legal questions. Thus, we do not apply the same Rule 56(c) standard as the district court because we do not determine whether the record establishes genuine factual issues. *Compare Wagner*, 227 F.3d at 320 ("In deciding an interlocutory appeal of a denial of qualified immunity, we can review the *materiality* of any factual disputes, but not their *genuineness*."), *with Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000) ("[S]ummary judgment will be affirmed only when [we are] convinced, after an independent review of the record, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") (internal quotations omitted).

Accordingly, the proper inquiry in the instant appeal is whether the district court was correct in determining that the

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(Cont'd)

the portion of the summary judgment motion addressing Kinney's and Hall's claims against the cities, counties, and the East Texas Police Chiefs' Association attacked those claims solely on their merits. Because a district court's order denying summary judgment based on the merits of claims is not a final decision within the meaning of § 1291, we do not have jurisdiction over an appeal of such an order. Accordingly, we dismiss the appeal of the district court's summary judgment order brought by the cities, counties, and the East Texas Police Chiefs' Association.

facts alleged by Kinney and Hall were *materially* sufficient to establish that the Police Chiefs' and Sheriffs' conduct was objectively unreasonable in light of law that was clearly established at the time of the alleged violations. As the Court held in *Mitchell*, our inquiry is a purely legal one: assuming as true the facts alleged by the plaintiff that the district court determined to be in genuine dispute, we determine whether those facts "support a claim of violation of clearly established law." 472 U.S. at 528 n.9.[8]

IV. QUALIFIED IMMUNITY

Under the doctrine of qualified immunity, "government officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Supreme Court pointed out in *Harlow* that in most cases, the "of which a reasonable person would have known" language in the qualified-immunity standard does not add anything to the "clearly established law" requirement because "a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19. However, the Court recognized that there may be "extraordinary circumstances" in which a

8. The district court determined that there is a genuine factual dispute regarding whether the Police Chiefs and Sheriffs retaliated against Kinney and Hall for testifying against law enforcement officers by taking actions (such as complaining to Holda and agreeing to boycott Kinney's and Hall's classes) intended to force Kilgore College to remove Kinney and Hall from the ETPA faculty. *See Kinney*, 111 F. Supp. 2d at 834-35.

government official "can prove that he neither knew nor should have known of the relevant legal standard" even though it was "clearly established." *Id.* at 819. Not long after *Harlow*, the Court refined the qualified-immunity standard by defining "clearly established" in a way that encompasses this "objective reasonableness" inquiry: To be "clearly established" for purposes of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, as this court has recognized, in light of the *Anderson* definition of "clearly established," the determination "whether a . . . right was clearly established at the time the defendant acted . . . requires an assessment of whether the official's conduct would have been objectively reasonable at the time of the incident." *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 340 (5th Cir. 2001).

The Supreme Court also clarified in *Anderson* that its explication of the "clearly established" standard does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." 483 U.S. at 640. Rather, conduct violates clearly established law if "in the light of pre-existing law the unlawfulness [is] apparent." *Id.* The Court further elaborated on the "clearly established" standard in *Siegert v. Gilley*, 500 U.S. 226 (1991), holding that the determination whether a right was clearly established at the time of the alleged violation necessarily entails a predicate "determination of whether the plaintiff has asserted a violation of a . . . right at all." *Id.* at 232.

Appendix C

A. The § 1985(2) Claim

In the district court, Kinney and Hall claimed that, by retaliating against them for their expert testimony in the Kerrville case, the Police Chiefs and Sheriffs violated 42 U.S.C. § 1985(2). Under § 1985(2), it is unlawful to

> conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.

42 U.S.C. § 1985(2) (1994). Subsection (3) creates a cause of action to remedy harm caused by a violation of subsection (2):

> if one or more persons engaged [in such a conspiracy] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. § 1985(3).

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The Police Chiefs and Sheriffs contend that Kinney's and Hall's § 1985(2) claims cannot withstand the "clearly established" test because it would not have been apparent to a reasonably competent official in October 1998 (when the East Texas Police Chiefs' Association held the meeting at which the Police Chiefs and Sheriffs agreed not to attend Kinney's and Hall's classes) that the Police Chiefs' and Sheriffs' conduct violated § 1985(2). The Police Chiefs and Sheriffs make three arguments in support of this position.

First, citing the Supreme Court's decision in *Kush v. Rutledge*, 460 U.S. 719 (1983), the Police Chiefs and Sheriffs note that for many years, the circuit courts of appeals interpreted the statute now codified as 42 U.S.C. § 1985(2) to prohibit only racially motivated retaliation. However, although the *Kush* Court did note that some circuits, including this circuit, had read a racial-animus requirement into § 1985(2), 460 U.S. at 723, the Court rejected that reading, holding that racial animus is not necessary to establish a § 1985(2) violation, *id.* at 726-27 ("[I]t is clear that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under the first clause of § 1985(2)."). Thus, it is not necessary for Kinney and Hall to allege racial animus in order to assert a violation of § 1985(2). In addition, *Kush*— a decision issued in 1983—leaves no doubt that it was clearly established well before the alleged violations in the instant case occurred that § 1985(2)'s application is not limited to cases involving racial animus.

Second, the Police Chiefs and Sheriffs argue that it was not clearly established that Kinney and Hall had claims under

§ 1985(2) because it is not clear that the "witnesses" protected by this provision include expert witnesses. The Police Chiefs and Sheriffs note that the statute prohibits a conspiracy to injure a person because that person testified "*truthfully*" arguing that expert witnesses testify as to their opinions, which are neither true nor false. The district court, however, agreed with Kinney and Hall that the terms of the statute make clear that expert witnesses are protected. The court pointed out that § 1985(2) specifically refers to "any" witness, rejecting the argument that the reference to truthful testimony excludes expert witnesses. *Kinney*, 111 F. Supp. 2d at 837. In so concluding, the district court reasoned that "[e]xpert witnesses take the same oath that non-experts take," i.e., "they swear to tell the *truth* and nothing but the *truth*." *Id.*

We agree with the district court that the plain language of the statute does not permit a contrary reading. As the district court pointed out, the language of the statute is sweeping. On its face, § 1985(2) applies to "*any* party or witness." That the protected right is the right to testify "truthfully" cannot, as the Police Chiefs and Sheriffs suggest, reasonably be interpreted as limiting the statute's protection to "fact" witnesses. Indeed, the premise underlying Kinney's and Hall's claims is that they have the right to testify freely as to what is in *truth* their opinion.

We also conclude that it would have been apparent to reasonably competent officials at the time of the alleged violations in this case that § 1985(2) proscribes conspiracies to intimidate or injure expert witnesses. In support of their argument that a reasonably competent official might have believed that § 1985(2) did not protect expert witnesses, the

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Police Chiefs and Sheriffs point out that neither the Supreme Court nor this court has specifically held that expert witnesses fall within the purview of § 1985(2). The Police Chiefs and Sheriffs incorrectly assume that a legal rule can be clearly established *only* pursuant to judicial decisions. The doctrine of qualified immunity assumes that reasonably competent officials know clearly established constitutional *or statutory* rights. Certainly, there may be circumstances in which a judicial opinion is necessary to clarify sufficiently that particular conduct violates the statutory provision invoked by the plaintiff. Such judicial clarification is not necessary, however, in interpreting § 1985(2). Subsection 1985(2) was in effect in October 1998, clearly deeming it unlawful to "conspire to deter, by force, intimidation, or threat, *any* . . . witness." Thus, we conclude that it would have been objectively unreasonable for the Police Chiefs and Sheriffs to believe that retaliation against Kinney and Hall for their testimony in the Kerrville case was lawful under § 1985(2) simply because Kinney and Hall testified as expert witnesses.

Finally, the Police Chiefs and Sheriffs argue that it was not clearly established in October 1998 that the conduct in question would injure Kinney and Hall in their "person[s] or property," as required by § 1985(2) and (3). Pointing out that they were not contractually obligated to send their officers to the ETPA or to any particular instructor for training, the Police Chiefs and Sheriffs argue that it was not clearly established that Kinney and Hall had a property interest in the Police Chiefs' and Sheriffs' enrollment of their officers in Kinney's and Hall's courses. The Police Chiefs and Sheriffs further contend that Kinney's and Hall's employment at Kilgore College was at-will, which does not establish a

property right under Texas law and thus is not a property interest for purposes of the Due Process Clause. Consequently, the Police Chiefs and Sheriffs argue, it would have been reasonable for an officer to believe that at-will employment was not "property" for purposes of § 1985(2).

In response to this argument, Kinney and Hall do not take the position that they were not at-will employees, but rather rely on *Haddle v. Garrison*, 525 U.S. 121 (1998), in which the Supreme Court held that "third-party interference with at-will employment relationships [ ] states a claim for relief under § 1985(2)." *Id.* at 126. In *Haddle*, the Court reasoned that because "[t]he gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings," "we see no reason to ignore th[e] tradition" in tort law of compensating for "[t]he kind of interference with at-will employment relations alleged here." *Id.* at 125-26. The Police Chiefs and Sheriffs, however, dismiss *Haddle* as irrelevant to this case because it was issued on December 14, 1998, after the events of October 1998.

Although a decision such as *Haddle*, which holds that the very conduct in question constitutes a violation of the right invoked by the plaintiff, is not necessary to establish that a reasonably competent official would have understood that the conduct was unlawful, *Anderson*, 483 U.S. at 640, we agree with the Police Chiefs and Sheriffs that it was not clearly established as of October 1998 that the "property" contemplated by § 1985(2) included at-will employment. As the Police Chiefs and Sheriffs point out, the Court granted certiorari in *Haddle* to resolve a circuit conflict on the

question whether at-will employment is "property" within the meaning of § 1985(2). 525 U.S. at 124. Further, as of the Court's *Haddle* decision, this circuit had not come down on one side or the other of the § 1985(2) "property" issue. Thus, given the absence of a definitive judicial interpretation of "property" for purposes of § 1985(2), coupled with the fact that at-will employment is not "property" for purposes of the Due Process Clause, we cannot conclude that § 1985(2) by its terms clearly established that third-party interference with at-will employment was injury to property.

However, the alleged conduct that forms the basis of Kinney's and Hall's § 1985(2) claims did not all take place in or before October 1998. Subsection 1985(3) creates a cause of action for injury to person or property caused by "*any act in furtherance* of the object of [a] conspiracy [to injure a witness in retaliation for his or her testimony]." § 1985(3) (emphasis added). Kinney and Hall have alleged that the Police Chiefs and Sheriffs took actions in furtherance of their conspiracy to have Kinney and Hall removed from their ETPA positions *after* as well as before the Supreme Court issued its decision in *Haddle* on December 14, 1998. In particular, Kinney and Hall claim (and the Police Chiefs and Sheriffs conceded in their depositions) that the Police Chiefs and Sheriffs continued to prohibit their officers from enrolling in Kinney's or Hall's classes for the entire time that they were working as instructors at the ETPA. Hall's resignation from the ETPA became effective on January 3, 1999, and Kinney's ETPA contract expired on September 1, 1999. Viewing the summary judgment record in the light most favorable to Kinney and Hall, it is reasonable to infer that if the Police Chiefs and Sheriffs had ceased their boycott of

Kinney's and Hall's courses after *Haddle* was issued, Holda may have reconsidered his conclusion that it was no longer economically viable for Kilgore College to offer Kinney's and Hall's courses, and thus Kinney and Hall may not have been injured.

Apparently conceding that *Haddle* was part of the clearly established law while the Police Chiefs and Sheriffs continued their boycott of Kinney's and Hall's courses, the dissent maintains that, under current law, the Police Chiefs' and Sheriffs' alleged conduct does not violate § 1985(2) because "when Congress enacted [§ 1985(2)] in 1871, it could not have intended it to extend to the facts at hand." It is not necessary, however, for the Congress of 1871 to have specifically contemplated the facts of the instant case in order to justify a conclusion that those facts constitute a violation of § 1985(2). Moreover, the dissent's unsupported assertions about congressional intent are belied by portions of § 1985(2)'s legislative history indicating that the Congress of 1871 intended for this provision's language regarding the rights of parties and witnesses in federal court to have "enormous sweep." *Kush*, 460 U.S. at 726 (internal quotations and citations omitted).[9] This aspect of § 1985(2)'s

9. The dissent correctly points out that the *Kush* Court characterized Congress's addition of "equal protection" language to the *second part* of § 1985(2) as an attempt to limit the "enormous sweep of the original language" *in that part.* However, this characterization does not affect our analysis of the *first part* of § 1985(2) invoked by Kinney and Hall in the instant case. Indeed, the *Kush* Court discussed the legislative history of § 1985 in the context of distinguishing the provisions of § 1985 that Congress limited—

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legislative history supports the *Haddle* Court's conclusion that "[t]he gist of the wrong at which § 1985(2) is directed is . . . intimidation or retaliation against witnesses in federal-court proceedings," and not specific types of injury to person or property. 525 U.S. at 125.

The dissent also maintains that *Haddle* does not make it "*apparent* . . . that not enrolling the officers to receive training from Plaintiffs constitutes [an] injury [to property within the meaning of § 1985(2)]." *Haddle* 's applicability to the instant case *is* apparent, however, when the facts at hand are properly viewed in the light most favorable to Kinney and Hall. The conduct that we assume is attributable to the Police Chiefs and Sheriffs for purposes of summary judgment—i.e., boycotting Kinney's and Hall's classes in order to pressure Holda to remove them from the ETPA faculty—clearly constitutes interference with Kinney's and Hall's employment and thus "injury in their property" under § 1985(2) as construed by the *Haddle* Court.

Thus, we conclude that after *Haddle*, the contours of § 1985(2) were sufficiently clear that it would have been apparent to a reasonably competent official that the ongoing

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namely, the provisions governing "activity that is not institutionally linked to federal interests and that is usually of primary state concern" (such as obstruction of justice in state courts)—from those provisions of § 1985 that Congress did *not* limit—namely, the provisions governing activity that is institutionally linked to federal interests. *Kush*, 460 U.S. at 725-26. These "federal institutional" provisions of § 1985— including the provision protecting witnesses and parties in federal court that Kinney and Hall invoke—still contain the original, sweeping language. *See id.*

boycott of Kinney's and Hall's courses violated § 1985(2). The district court properly denied the Police Chiefs and Sheriffs qualified immunity from the § 1985(2) claim.[10]

B. The § 1983 Claim Invoking the Right to Freedom of Speech Under the First and Fourteenth Amendments

The district court also denied the Police Chiefs and Sheriffs qualified immunity against Kinney's and Hall's § 1983 claims alleging that the Police Chiefs and Sheriffs unlawfully retaliated against Kinney and Hall for exercising their rights to free speech under the First and Fourteenth Amendments.[11] The court

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10. The Police Chiefs and Sheriffs also argue that "all reasonable officers in October 1998 would [not] have known that Defendants' actions— furthering public safety through high-quality training for their officers, expressing concerns over instructors' conflicts of interests, exercising discretion to choose instructors for training their law enforcement officers, maintaining confidentiality over their internal methods of law enforcement, and preventing someone privy to sensitive and confidential information from [testifying] as an expert witness in future litigation against them—would violate [§ 1985(2)]." However, the Police Chiefs and Sheriffs are merely asserting their version of the facts that the district court determined to be in genuine dispute. Such assertions are appropriately made to the jury, not to this court on interlocutory appeal. We conclude that the Police Chiefs and Sheriffs are not entitled to qualified immunity from Kinney's and Hall's § 1985(2) claims because, assuming *Kinney and Hall's* version of the facts to be true, "those facts are materially sufficient to establish that [the Police Chiefs and Sheriffs] acted in an objectively unreasonable manner [in light of clearly established law]." *Chiu*, 260 F.3d at 341 (citation and internal quotations omitted).

11. "It has long been established that the[ ] First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

evaluated the summary judgment evidence in light of the law governing First Amendment retaliation claims brought by public employees. *See Kinney*, 111 F. Supp. 2d at 837. Acknowledging that Kinney and Hall were not employees of the Police Chiefs and Sheriffs, the district court noted that in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the Supreme Court held that the First Amendment analysis applied in the public employment context is also applicable to the First Amendment claims of independent contractors who provide services to the government. The court concluded that Kinney and Hall "are the equivalent of a governmental independent contractor" because "they were hired by the defendants to train their officers." *Kinney*, 111 F. Supp. 2d at 841 (citing *Umbehr*, 518 U.S. at 674).

The district court determined that there was sufficient evidence to raise a genuine factual issue on each of the three elements of a First Amendment retaliation claim in the public employment context. First, the district court found that both Kinney and Hall claimed that they had suffered adverse employment actions by being forced to accept lower paying jobs as a result of the Police Chiefs' and Sheriffs' boycott. *Id.* at 838. Second, the court held that Kinney's and Hall's testimony regarding the use of excessive force by police officers is unquestionably a matter of public concern. *Id.* Finally, the court determined that the balancing inquiry set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), weighed in favor of Kinney and Hall, i.e., that Kinney's and Hall's "interest in commenting on matters of public concern outweighs the defendants' interest in promoting efficiency." *Kinney*, 111 F. Supp. 2d at 838. The court further determined that the law under which it examined

the summary judgment evidence was clearly established at the time of the alleged violation and that the Police Chiefs' and Sheriffs' conduct was objectively unreasonable in light of that clearly established law. *See id.* at 840-44.

As we noted in our analysis of Kinney's and Hall's § 1985 claims, the threshold issue in a qualified-immunity inquiry is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194 (2001). Only if we determine that the facts establish a constitutional violation do we address the "more particularized" question whether "[t]he contours of the right [were] sufficiently clear [at the time of the alleged violation] that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. For purposes of both these inquiries, we assume as true the facts alleged by Kinney and Hall, namely, that the Police Chiefs and Sheriffs retaliated against Kinney and Hall for their testimony against a law enforcement officer by "blackballing" them in the law enforcement community of East Texas with the intention of forcing Kilgore College to remove them from the ETPA faculty. *See Kinney*, 111 F. Supp. 2d at 838 ("[T]he record demonstrates that the plaintiffs' speech motivated the decision to boycott their business.") Accordingly, we first address whether such conduct constitutes a violation of Kinney's and Hall's rights to free speech.

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1. Was there a First Amendment violation?

"Throughout its history th[e Supreme] Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk": (1) "certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection," and (2) some governmental limitations of protected speech have nevertheless been determined to be valid under the First Amendment. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-51 (1961). Accordingly, we first address whether Kinney's and Hall's testimony falls under the First Amendment's protection, and if we determine that the testimony is protected speech, we then determine what the applicable First Amendment standard is and whether the Police Chiefs' and Sheriffs' restriction of Kinney's and Hall's speech violated the First Amendment.

a. Is the speech protected by the First Amendment?

There is no question that Kinney's and Hall's testimony in the Kerrville case is speech protected by the First Amendment. Testimony in judicial proceedings "is inherently of public concern." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989); *see also Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987) (testimony in civil proceedings); *Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982) (testimony in criminal proceedings); *Rainey v. Jackson State Coll.*, 481 F.2d 347, 349-50 (5th Cir. 1973) (testimony of expert witness). Moreover, the testimony at issue in the instant case is of

public concern not only because of its context, but also because of its subject matter—i.e., the use of excessive force by police officers. We have repeatedly emphasized that "[e]xposure of official misconduct, especially within the police department, is generally of great consequence to the public." *Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001) (citing *Brawner v. City of Richardson*, 855 F.2d 187, 191-92 (5th Cir. 1988)); *see also Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994) ("There is perhaps no subset of 'matters of public concern' more important than bringing official misconduct to light."). As speech of public concern, Kinney's and Hall's testimony is "at the heart of the First Amendment's protection." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978).

b. What is the applicable First Amendment analysis?

Having concluded that Kinney's and Hall's testimony is protected speech, we must next determine the appropriate First Amendment analysis for evaluating the Police Chiefs' and Sheriffs' conduct. The First Amendment shields speech "not only [from] direct limitations . . . but also [from] adverse government action against individual[s] because of [their speech]," including the denial of public benefits to punish individuals for their speech. *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999). In the instant case, the district court found such a denial of public benefits because the Police Chiefs and Sheriffs retaliated against Kinney and Hall for their testimony against law enforcement officers by boycotting Kinney's and Hall's courses with the intention of compelling Kilgore College to remove them from the ETPA faculty.

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The Police Chiefs and Sheriffs suggest that their relationship with Kinney and Hall was too attenuated to create any power on the part of the Police Chiefs and Sheriffs to grant or deny Kinney and Hall any benefits. Specifically, the Police Chiefs and Sheriffs argue that their conduct did not deny Kinney and Hall the "benefit" of employment because Kilgore College, and not the Police Chiefs and Sheriffs, had authority to refuse to renew Kinney's and Hall's contracts. We disagree: the Supreme Court has made clear that First Amendment protection does not depend on whether the governmental action at issue is "direct" or "indirect." *See Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (holding that the plaintiff teacher's "lack of a contractual or tenure 'right' to re-employment for [another] academic year is immaterial to his free speech claim"). To hold that the Police Chiefs' and Sheriffs' conduct cannot constitute a First Amendment violation because they did not directly deny Kinney and Hall the benefit of employment, but instead used governmental power to exert economic pressure on Kinney and Hall's employer in order to achieve that same result, "would allow the government to 'produce a result which [it] could not command directly.' " *Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (alteration in original).[12] "Such interference with constitutional rights is impermissible." *Id.*

12. The dissent expresses skepticism regarding whether "enrollment of students in a particular class with a particular teacher [can constitute] a cognizable benefit, the withholding of which would be protected by our First Amendment jurisprudence." However, when the principle enunciated by the *Perry* Court is applied to the facts of the instant case (viewed in the light most favorable to Kinney and Hall), it is evident that the Police Chiefs and Sheriffs denied Kinney and Hall a benefit: the Police Chiefs and Sheriffs withdrew their officers from and ceased enrolling officers in *any* course taught by

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The Police Chiefs and Sheriffs also contend that their conduct does not amount to a denial of benefits actionable under the First Amendment because their decisions on whether and where to enroll officers are discretionary—they had no legal obligation to enroll their officers in Kinney's and Hall's courses. However, whether an individual is entitled to the benefit denied is irrelevant to our First Amendment analysis. Governmental discretion is *always* bound by the Constitution. As the Court stated in *Perry:*

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that

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Kinney or Hall in order to pressure Kilgore College to remove them from the ETPA faculty. Further, it is important to bear in mind that the First Amendment does not protect receipt of governmental benefits *per se*, as the dissent's argument appears to suggest, but rather protects the *speech* that the government seeks to inhibit through the denial of a benefit. *Cf. Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) ("[T]he First Amendment does not create property or tenure rights. . . . The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern."). As the Court explained in *Perry*, "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." 408 U.S. at 597.

> infringes his constitutionally protected interests—*especially, his interest in freedom of speech.*

Id. at 597 (emphasis added).

This general principle enunciated in *Perry*, known as the " 'unconstitutional conditions' doctrine," *Umbehr*, 518 U.S. at 674, has been applied in a variety of contexts. The appropriate analytical framework for applying the "unconstitutional conditions" doctrine to a given First Amendment claim depends on the context in which the claim arose. As the Court explained in *Umbehr*, "unconstitutional conditions" cases form a "spectrum": at one end lie cases involving "government employees, whose close relationship with the government requires a balancing of important free speech and government interests," and on the other end lie cases involving "ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 518 U.S. at 680.[13]

The Court has determined that interest-balancing is appropriate in "governmental employee" cases, but not in "ordinary citizen" cases, because "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts

13. The *Umbehr* Court noted that in between these two ends of the "unconstitutional conditions" spectrum lie "claimants for tax exemptions," 518 U.S. at 680 (citing *Speiser v. Randall*, 357 U.S. 513 (1958)), "users of public facilities," *id.* (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-94 (1993)), "and recipients of small government subsidies," *id.* (citing *FCC v. League of Women Voters*, 468 U.S. 364 (1984)).

as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). Because the government has *no* legitimate interest in denying a benefit to "ordinary citizens" because of their speech on matters of public concern, there is no interest-balancing involved in the First Amendment analysis for "ordinary citizen" cases. *Umbehr*, 518 U.S. at 675-76; *Blackburn v. City of Marshall*, 42 F.3d 925, 932, 934 (5th Cir. 1995). Rather, the First Amendment is violated in "ordinary citizen" cases if (1) the individual engaged in conduct protected by the First Amendment and (2) the government took adverse action against the person because of that protected conduct. *See, e.g., Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996); *N. Miss. Communications, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986); *Sisk v. Tex. Parks & Wildlife Dep't*, 644 F.2d 1056, 1059 (5th Cir. Unit A May 1981); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. Jan. 1981).

The Supreme Court recognized the need for interest-balancing in the public employment context and "indicate[d] some of the general lines along which an analysis of the controlling interests should run" in *Pickering v. Board of Education*, 391 U.S. 563, 569 (1968). In that case, the Court held that a board of education violated a teacher's First Amendment rights by discharging him in retaliation for his criticism of the board's school funding decisions. *See id.* at 566, 574-75. In so holding, the Court emphasized that government employees "may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public

[institutions] in which they work." *Id.* at 568. The Court also recognized, however, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* Thus, explained the Court, it is necessary "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

In *Umbehr* and its companion case, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Court held that the "governmental employee" version of the unconstitutional-conditions doctrine—i.e., a *Pickering* balancing inquiry—is also appropriate where an independent contractor alleges a First Amendment violation against the government. *See O'Hare Truck Serv.*, 518 U.S. at 719-21; *Umbehr*, 518 U.S. at 677-78. The Court reasoned that the government's "[i]ndependent contractors are similar in most relevant respects to government employees." *Umbehr*, 518 U.S. at 684. Specifically, the Court noted:

> The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all. But either type of relationship provides a valuable financial benefit, the threat

> of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, "are often in the best position to know what ails the agencies for which they work."

Id. at 674 (quoting *Waters*, 511 U.S. at 674).

Based on reasoning similar to that of the Court in *Umbehr* and *O'Hare Truck Service*, this court has also applied a *Pickering* balancing test in First Amendment retaliation cases arising outside the public employment context. *See, e.g.*, *Copsey v. Swearingen*, 36 F.3d 1336, 1344 (5th Cir. 1994) (holding that a *Pickering* balancing analysis was the appropriate framework for evaluating a vending stand operator's First Amendment claim based on a state agency's revocation of his license after he publicly criticized the licensing program) ("Copsey is not a public employee. Nevertheless, the Rules and Regulations of the [agency's vendor licensing program] bear the mark of an employment-type relationship."); *Caine v. Hardy*, 943 F.2d 1406, 1415-16 (5th Cir. 1991) (en banc) (treating an anesthesiologist with clinical privileges at a public hospital as a "public employee" for purposes of his First Amendment claim based on the hospital's permanent suspension of his clinical privileges after he opposed a proposal made by the chief of anesthesiology). On the other hand, in some circumstances individuals who have a relationship with the government beyond that of an "ordinary citizen" are nonetheless more appropriately placed at the "ordinary citizen" end of the *Umbehr* spectrum than at the "governmental employee" end. In such cases, the "ordinary citizen" version of the

"unconstitutional conditions" doctrine is applicable. *See Blackburn*, 42 F.3d at 932, 934-35.

As we explained in *Blackburn*, the determination whether a relationship between the government and an individual falls on the "governmental employee" end of the *Umbehr* spectrum turns on whether the relationship is sufficiently "analogous to an employment relationship."[14] 42 F.3d at 932. Applying this standard in *Blackburn*, we held that the *Pickering* balancing test was not applicable to a wrecker service owner's First Amendment retaliation claim against police officials for revoking his permission to use the police radio frequency. *Id.* at 930, 934.[15] We reasoned that the business relationship between the wrecker service owner and the police officers was similar to that between the governmental defendant and the plaintiff in *North Mississippi Communications*, another case in which we applied the "ordinary citizen" version of the "unconstitutional conditions" doctrine. *See Blackburn*, 42 F.3d at 934. *North Mississippi Communications* involved a newspaper's First Amendment claim alleging that a county

14. We determined in *Blackburn* that there is another situation in which balancing is appropriate; namely, if the speech at issue does not involve matters of public concern, but instead involves matters only of personal interest. *Blackburn*, 42 F.3d at 933 (citing *Connick v. Myers*, 461 U.S. 138, 146-47, 154 (1983)). As we have already concluded, Kinney's and Hall's testimony is speech of public concern, and thus the *Connick* prong of the *Blackburn* analysis does not apply in this case.

15. Revocation of the wrecker service owner's permission to use the police radio frequency rendered him unable to participate in a rotation system for removing vehicles from the scenes of accidents. *Blackburn*, 42 F.3d at 930.

board had ceased placing legal notices in the newspaper in retaliation for the publication of editorials that criticized the board and its members. 792 F.2d at 1337. We did not apply a *Pickering* balancing test to the newspaper's First Amendment claim, but rather held that "[a]lthough the [newspaper] may have no 'right' to receive certain legal advertising from the County Board . . . it would violate the Constitution for the Board to withhold public patronage, in the form of its advertising, . . . in retaliation for that newspaper's exercise of first amendment rights." *Id.*

In arguing that Kinney and Hall were not denied any "benefits," the Police Chiefs and Sheriffs emphasized their lack of employment-type ties to Kinney and Hall. In contrast, in support of their argument regarding the appropriate First Amendment analysis, the Police Chiefs and Sheriffs characterize their relationship with the ETPA and ETPA instructors as sufficiently akin to employment to warrant a balancing of the Police Chiefs' and Sheriffs' interests against the free speech interests at stake in this case.[16] In support of

16. Similarly, although the dissent points out that Kilgore College "had the sole authority to hire and fire" Kinney and Hall in arguing that the Police Chiefs' and Sheriffs' enrollment decisions cannot amount to a "denial of benefits" for First Amendment purposes, the dissent nevertheless agrees with our determination that the governmental interests at stake in the instant case are sufficiently analogous to employment interests to warrant application of a *Pickering* balancing analysis instead of an "ordinary citizen" analysis. As the *Umbehr* Court recognized, the ability to suppress constitutionally-protected speech through the denial of a benefit tends to go hand-in-hand with employer-like interests. *See* 518 U.S. at 674 (noting that the government "provides a valuable financial benefit [to governmental contractors as well as employees], the threat of the loss of which in retaliation for speech may chill speech on matters of public concern").

this claim, the Police Chiefs and Sheriffs note that the East Texas Police Chiefs' Association founded the ETPA in 1966 and operated it until it later became a part of Kilgore College. In addition, the Police Chiefs and Sheriffs point out, they had sent officers to the ETPA for training for over three decades prior to the Kerrville case controversy, and many law enforcement officials from the East Texas region (including the Police Chiefs and Sheriffs) sat on the ETPA's advisory board.

Relying on *North Mississippi Communications* and *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000), Kinney and Hall respond that the "ordinary citizen" version of the unconstitutional-conditions doctrine is better suited to the circumstances of the instant case than is the "governmental employee" test requiring interest-balancing. In *Worrell*, the Tenth Circuit declined to apply a *Pickering* balancing test to a First Amendment claim alleging that the governmental defendant pressured the plaintiff's employer to rescind the plaintiff's job offer in retaliation for the plaintiff's testimony in a criminal case. *See* 219 F.3d at 1202, 1209-12. Rather, the *Worrell* court determined that the appropriate First Amendment analysis for evaluating the plaintiff's claim was the "ordinary citizen" version of the unconstitutional-conditions doctrine. *See id.* at 1212-13.[17]

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17. We note that the Police Chiefs and Sheriffs are incorrect in their claim that the Tenth Circuit established a "new" First Amendment analysis in *Worrell*. The *Worrell* court simply applied the "ordinary citizen" version of the "unconstitutional conditions" doctrine that federal courts have been applying for years in cases that do not arise in the public employment context.

Appendix C

We agree with the district court and the Police Chiefs and Sheriffs that a *Pickering* balancing analysis is properly applied to Kinney's and Hall's First Amendment claims. The relationship between the Police Chiefs and Sheriffs and ETPA instructors such as Kinney and Hall involves governmental interests similar to those involved in the public employment context. Legitimate interests require that law enforcement agencies be afforded considerable discretion in choosing the instructors who train the officers who will, in turn, carry out the agencies' public duties on a daily basis. Those interests include, for example, ensuring that the instructors are competent and knowledgeable, that they are adept at conveying that knowledge to officer-students, and that they maintain a good working relationship with law enforcement agency officials so that those officials can monitor the training that their officers receive. These interests are all relevant to the ultimate governmental interest that the *Pickering* balancing analysis is meant to protect, i.e., the interest "in promoting the efficiency of the public services [a law enforcement agency] performs." *Pickering*, 391 U.S. at 568.

Although Kinney and Hall are correct that many of the facts of *Worrell* are similar to those at issue in this case, there is a significant difference between the relationship that the *Worrell* governmental defendant had with the plaintiff and the relationship that the Police Chiefs and Sheriffs had with Kinney and Hall. It is this relationship that determines whether application of the "ordinary citizen" or the "governmental employee" version of the "unconstitutional conditions" doctrine is appropriate. In contrast to this case, the relationship between the plaintiff and the non-employer governmental defendant in *Worrell* was not analogous to an

employment relationship. The *Worrell* defendant, an official in charge of a state drug enforcement agency, had offered to assist those working in the district attorney's "drug task force." 219 F.3d at 1202. However, upon learning that the district attorney offered the plaintiff the position of task force coordinator, the defendant informed the district attorney that the state drug agency would not assist the drug task force unless the plaintiff's job offer was rescinded because the plaintiff had testified as an expert witness for the defense in a prosecution for the murder of one of the agency's officers. *See id.* Thus, unlike the relationship that the Police Chiefs and Sheriffs had with Kinney and Hall, the relationship between the *Worrell* defendant and plaintiff was not analogous to an employment relationship. The *Worrell* defendant did not pay the task force members for their services to help the drug agency carry out its mission (which might have created an employment-type relationship), but rather offered to assist the task force members in carrying out the task force's mission. In contrast, the Police Chiefs and Sheriffs in effect retained Kinney and Hall to train officers, a core aspect of the public services performed by the Police Chiefs' and Sheriffs' respective law enforcement agencies.

Thus, we conclude that the district court correctly determined that Kinney's and Hall's First Amendment claims are subject to a *Pickering* balancing test. In cases where the relationship between the governmental defendant and the plaintiff necessitates balancing of interests, the elements of a First Amendment retaliation claim properly reviewed on interlocutory appeal are the legal questions (1) whether the speech "can be fairly characterized as constituting speech

on a matter of public concern," and (2) whether the *Pickering* balance weighs in favor of the First Amendment interests at stake in the case. *Branton*, 272 F.3d at 739 (internal quotations omitted). "It is for the jury to resolve any remaining factual disputes as to [causation]." *Id.* We have already concluded that Kinney's and Hall's testimony is clearly on a matter of public concern. Accordingly, we now consider whether the district court correctly balanced the interest in protecting that speech against the Police Chiefs' and Sheriffs' interests in suppressing it.

c. Does the conduct in question violate the First Amendment under the applicable First Amendment analysis?

The *Pickering* balancing test requires a case-specific inquiry. *See O'Hare Truck Serv.*, 518 U.S. at 719-20; *see also Pickering*, 391 U.S. at 569 ("Because of the enormous variety of fact situations [involving] critical statements by . . . public employees . . . , we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."). Accordingly, we must determine whether the First Amendment interest in ensuring that individuals working in law enforcement are able to speak freely about police misconduct outweighs the Police Chiefs' and Sheriffs' interests in prohibiting their training instructors from testifying in an excessive-force case in another part of the state against a police officer who had never taken courses at the ETPA and a police department that had never enrolled officers in ETPA courses. In contrast, the dissent asks whether the First Amendment interests outweigh the Police Chiefs'

and Sheriffs' more general "interests in effective training of their law enforcement personnel." We do not consider it appropriate to frame the governmental interest involved in the instant case in such broad terms. As noted above, while we recognize that this interest in effective training of law enforcement officers requires that law enforcement agencies be afforded considerable discretion in choosing officer-training instructors, this discretion is bounded by the Constitution. In this case, the question is whether the Police Chiefs and Sheriffs exceeded the limits imposed by the First and Fourteenth Amendments. To answer that question, *Pickering* instructs that we assess the government's interest in restricting the *particular speech* in question.

The *Pickering* Court considered a school board's interest in restricting a teacher's statements criticizing the board's distribution of school funds—not the school board's more general interest in choosing teachers—against the First Amendment interest in protecting those statements. *See* 391 U.S. at 569-73. Similarly, the appropriate inquiry in the instant case is whether the Police Chiefs' and Sheriffs' interests in prohibiting their training instructors from testifying as experts in an excessive-force trial held in another part of the state against a police officer who had never taken courses at the ETPA and a police department that had never enrolled officers in ETPA courses outweighs the First Amendment interest in protecting such speech. To consider, as the dissent does, only the Police Chiefs' and Sheriffs' general interests in choosing instructors, divorced from the particular circumstances in which they exercised this power with respect to Kinney and Hall, renders the *Pickering* balancing analysis virtually powerless to protect First

Amendment interests. Having defined the proper *Pickering* inquiry, we now turn to the First Amendment interest at stake in this case.

The First Amendment interest at stake in this case is extremely strong. Protection of speech critical of public officials' exercise of their powers is an integral part of the "public debate" that the First Amendment protects. As the Court recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. As noted above, this court has also recognized the great First Amendment significance of speech regarding misconduct of public officials, "especially when it concerns the operation of a police department." *Brawner*, 855 F.2d at 191-92.[18]

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18. Although the dissent acknowledges that Kinney's and Hall's "testi[mony] as expert witnesses against law enforcement" is protected speech under the First Amendment, the dissent's *Pickering* balancing analysis fails to take into account the great strength of the First Amendment interest in protecting speech about official misconduct. Notably, in weighing the governmental interest against the First Amendment interest involved in this case, the dissent does not mention that the subject matter of Kinney's and Hall's speech was official misconduct, much less official misconduct as grave as a police officer's use of excessive force. The dissent further minimizes the First Amendment interest at stake in this case by characterizing it as solely Kinney's and Hall's interest. However, it is well-established that the First Amendment interest in protecting speech on matters of public concern—particularly speech regarding official

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Indeed, because individuals working in law enforcement "are often in the best position to know" about the occurrence of official misconduct, *Umbehr*, 518 U.S. at 674, "it is essential" that individuals such as Kinney and Hall "be able to speak out freely" about officer misconduct, particularly misconduct that is as serious as excessive force, *Pickering*, 391 U.S. at 572. As the district court pointed out, "[i]ndividuals will have a hard time succeeding in an excessive force case without the assistance of experts who are intimately acquainted with police procedures." *Kinney*, 111 F. Supp. 2d at 838.

In the particular circumstances of this case, we find it clear that this significant First Amendment interest outweighs any interest of the Police Chiefs and Sheriffs in prohibiting their training instructors from testifying against law enforcement. The Police Chiefs and Sheriffs claim that Kinney's and Hall's testimony created a "conflict of interest" and "violated . . . principles of cooperative responsibility [and] trust," thereby "undermin[ing] [the Police Chiefs' and Sheriffs'] feelings of personal loyalty and confidence" in Kinney and Hall and potentially damaging the relationship between student-officers and training instructors. Although there may be cases in which it is conceivable that speech by a training instructor could threaten these interests, we find

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misconduct—is preeminently a *public* interest. *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

any such threat inconceivable in the instant case. As the district court pointed out, Kinney and Hall "testified against a police department located in an entirely different part of the state than the one in which they trained officers." *Kinney*, 111 F. Supp. 2d at 843. In invoking notions of "conflict of interest," "personal loyalty," and "principles of cooperative responsibility" under the circumstances that obtained here, the Police Chiefs and Sheriffs appear to be employing euphemisms for a "code of silence" prohibiting persons who work in law enforcement from speaking out about misconduct on the part of others working in law enforcement. *See Snyder v. Trepagnier*, 142 F.3d 791, 797 n.6 (5th Cir. 1998) (quoting the testimony of an expert in the field of police operations and administration describing "the existence of a very deeply-rooted code of silence . . . a code within the police department that, regardless what the behavior, one police officer does not report or testify against another police officer").[19]

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19. This case is by no means the first time that this court has recognized the existence of a "code of silence" among law enforcement officers. *See, e.g., Piotrowski v. City of Houston*, 237 F.3d 567, 575 & n.8, 576-77 (5th Cir. 2001) (concluding that the deposition of a police officer established that, pursuant to the Houston Police Department's "code of silence," police officers "took affirmative steps to suppress any information concerning [possible mistakes in an] investigation"); *Sharp v. City of Houston*, 164 F.3d 923, 936 (5th Cir. 1999) (concluding that the "evidence supports the conclusion that [the Houston Police Department] at least tacitly authorized, and maybe encouraged and assisted in, retaliation against subordinate officers who broke the code of silence").

In a number of cases, our sister circuits have also recognized the existence of a "code of silence" in law enforcement. *See, e.g.*,

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Enforcing such a "code of silence" is not a legitimate interest because it does not promote the efficiency of the public services performed by a law enforcement agency. *Pickering*, 391 U.S. at 568.[20]

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B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1096 (9th Cir. 2002) (noting that the plaintiff officer testified "that during her police academy training, all of the recruits were taught about the 'code of silence' that functioned as an unwritten department policy against speaking out against fellow officers"); *Carter v. Morris*, 164 F.3d 215, 220 (4th Cir. 1999) (describing police officers' testimony in another case that a "code of silence" prevented the punishment of officers for the use of excessive force); *Sledd v. Lindsay*, 102 F.3d 282, 287 (7th Cir. 1996) (pointing out that the plaintiff arrestee's complaint "alleged in considerable detail how the 'code of silence' operated, [claiming] specifically that the code injured [the plaintiff] because the officers responsible for using excessive force and otherwise abusing him had good reason to believe that their misconduct would not be revealed by their fellow officers and that they would effectively be immune even if a complaint was filed"); *Meriwether v. Coughlin*, 879 F.2d 1037, 1049 (2d Cir. 1989) (affirming the district court's admission of testimony in which the commissioner of the state department of correctional services "admitted knowing that corrections officers generally adhere to a 'code of silence' and lie to conceal other officers' assaults on prisoners").

20. The Police Chiefs and Sheriffs never protested Kinney's previous expert testimony on the side of law enforcement or argued that such testimony created a conflict of interest. Indeed, the Police Chiefs and Sheriffs have explicitly stated in the record that, in contrast to expert testimony by their training instructors on behalf of plaintiffs in police misconduct cases, the Police Chiefs and Sheriffs do not believe that expert testimony by their training instructors on behalf

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In fact, enforcing a "code of silence" not only fails to promote the efficiency of a law enforcement agency in carrying out its public duties—it undermines that efficiency. One of the primary interests of law enforcement agencies is ensuring that officer misconduct is disclosed and can thus be addressed and prevented in the future. As this court has recognized, the First Amendment interest in protecting speech about official misconduct is also a governmental interest, and there are circumstances in which that interest outweighs any other governmental interests that may be implicated. *See Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1270 (5th Cir. 1992) (concluding that if the plaintiff police officer made a sexual harassment report in good faith, then the "interest in maintaining a police force that is free of sexual intimidation, which [such] good faith reports would serve, outweighs any interest in departmental efficiency and harmony"). The instant case involves such circumstances. The governmental and First Amendment interest in protecting Kinney's and Hall's testimony regarding officer misconduct outweighs any interest of the Police Chiefs and Sheriffs in avoiding potential "conflicts of interest," given that the testimony was against a police officer who had never trained at the ETPA and a police department that had no connections to the ETPA.

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of law enforcement gives rise to a "conflict of interest." This viewpoint discrimination by the Police Chiefs and Sheriffs only further convinces us that they did not have any legitimate interest in suppressing Kinney's and Hall's speech. *Cf. Smith*, 693 F.2d at 368, *overruled on other grounds by Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992) ("To allow a prosecutor to retaliate against trial testimony on the grounds that it was unfavorable to the state would impermissibly restrict the free expression of the witness based on the content of his testimony.").

Appendix C

We have concluded that Kinney's and Hall's testimony was speech of public concern and that the First Amendment interests in that testimony outweigh any governmental interests in this case.[21] Accordingly, because the district court found that Kinney and Hall established a genuine factual issue regarding whether the Police Chiefs and Sheriffs boycotted Kinney's and Hall's courses and sought to have them removed from the ETPA faculty because of their testimony, *Kinney*, 111 F. Supp. 2d at 838, 843, the facts alleged by Kinney and Hall are sufficient to state a First Amendment violation. *See supra* Subsection IV.B.1.b.

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21. Given the case-specific nature of the *Pickering* inquiry, this case does not present—and thus we do not address—the questions whether a law enforcement agency has legitimate interests in prohibiting its training instructors from serving as expert witnesses against officers who are employed by that agency or whether any such legitimate interests would be outweighed by the First Amendment interest in ensuring that speech about official misconduct is uninhibited. Consequently, *Tedder v. Norman*, 167 F.3d 1213 (8th Cir. 1999), the Eighth Circuit case relied on by the dissent, has little, if any, bearing on the instant case. The issue in *Tedder* was whether a state law enforcement training academy violated the First Amendment by terminating a training instructor who testified against an officer who was employed by a law enforcement agency *that sent its officers to the academy for training*. *See id.* at 1214-15. As we explain above, it is because Kinney's and Hall's speech was about a police officer who had never been trained by the ETPA and who was employed by a police department that had never enrolled its officers in ETPA courses that we conclude the Police Chiefs and Sheriffs do not have legitimate interests in suppressing that speech and, thus, that the strong First Amendment interest in speech about official misconduct unquestionably outweighs any governmental interest in the instant case.

Appendix C

We now turn to the "clearly established" question of qualified-immunity analysis, i.e., whether it would have been apparent to a reasonable officer under law clearly established the time of the alleged violation that the Police Chiefs' and Sheriffs' conduct violated the First Amendment.

2. The "clearly established" inquiry: Would it have been apparent to a reasonably competent officer that the alleged conduct violated the First Amendment?

Because the applicable law dictating that the Police Chiefs' and Sheriffs' alleged conduct violated Kinney's and Hall's First Amendment rights to free speech was in existence before October 1998, we have already "set forth principles which will become the basis for [our inquiry into whether] that right [wa]s clearly established" at the time of the alleged violation. *Saucier*, 121 S. Ct. at 2156. However, our conclusion that the Police Chiefs' and Sheriffs' conduct constituted a First Amendment violation under the controlling law at the time of the alleged violation is an important, but not dispositive, consideration in the "clearly established" inquiry. As the Supreme Court has explained, the "clearly established" inquiry is distinct from the inquiry into whether a right was violated "in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson*, 483 U.S. at 640).

There is no question that it was clearly established well before October 1998 that Kinney's and Hall's testimony was of public concern and thus was speech protected by the First

Amendment. The Police Chiefs and Sheriffs do not attempt to argue otherwise, but rather suggest that it was not clearly established that the First Amendment imposed any restrictions on their conduct vis-a-vis Kinney and Hall in their capacity as training instructors. The Police Chiefs and Sheriffs point out that there is no controlling caselaw directly addressing a First Amendment claim in the specific circumstances of this case, i.e., where a plaintiff has provided services to the governmental defendant but is neither an employee of the defendant nor in a contractual relationship with the defendant. More specifically, the Police Chiefs and Sheriffs characterize Kinney and Hall as "employees of a 'disappointed bidder'—i.e., Kilgore College." The Police Chiefs and Sheriffs apparently base this contention in part on the Court's admonishment in *Umbehr* that "[b]ecause Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." 518 U.S. at 685.

Initially, we reject the implication of the Police Chiefs' and Sheriffs' argument that it would have been reasonable for an officer in their positions to believe that they were completely unfettered by the First Amendment merely because their relationship with Kinney and Hall was non-employment and non-contractual. Both the Supreme Court and this court have explicitly rejected such reasoning. In *O'Hare Truck Service*, the Court rejected "the proposition . . . that those who perform the government's work outside the formal employment relationship are subject to what we conclude is the direct and specific abridgment of First

Amendment rights." 518 U.S. at 720. Similarly, in *Blackburn*, we stated that the district court's "assumption that only public employees enjoy the protections of the First Amendment" rested on "inverted" reasoning because "[e]very citizen enjoys the First Amendment's protections against governmental interference with free speech." 42 F.3d at 931.[22] As we explained in *Blackburn*, the Supreme Court did not formulate the "governmental employee" version of the "unconstitutional conditions" doctrine in order to limit the applicability of the First Amendment to the public employment context, but rather in order to take into account that "the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship." *Id.* Indeed, the Court's decisions in *Pickering*, *Umbehr*, and *O'Hare Truck Service* are based on the assumption that although the government may have relationships with individuals in addition to a government/citizen relationship, individuals do not, as a result of such relationships, cease to be citizens with First Amendment rights that the government is obligated to respect.

The Police Chiefs and Sheriffs also incorrectly assume that a decision addressing the specific circumstances of the instant case is a necessary condition of "clearly established" law. "The relevant, dispositive inquiry in determining

22. Moreover, the analysis that this court set forth in *Blackburn* for determining whether a First Amendment claim alleging retaliatory denial of governmental benefits is governed by the "ordinary citizen" or "governmental employee" version of the "unconstitutional conditions" doctrine assumes that one of these two levels of First Amendment scrutiny applies. *Blackburn* does not leave open the possibility that there are circumstances in which a governmental denial of benefits is not subject to any First Amendment restrictions.

whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 121 S. Ct. at 2156. As this court has explained, "[t]he term 'clearly established' does not necessarily refer to commanding precedent that is factually on all-fours with the case at bar," but rather is based on the premise that "officials must observe general, well-developed legal principles." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 455 (5th Cir. 1994) (en banc) (internal quotations and citations omitted). In light of our 1995 opinion in *Blackburn* and the Court's 1996 opinions in *Umbehr* and *O'Hare Truck Service*, it was clearly established in October 1998 that if the government's relationship with an individual is sufficiently similar to an employment relationship in terms of the relative interests at stake, a *Pickering* balance is appropriate. Otherwise, the general rule is that the government has no more interest in inhibiting the plaintiff's speech than any other citizen's speech, and thus an "ordinary citizen" First Amendment retaliation analysis is appropriate. *See Blackburn*, 42 F.3d at 932, 934.

In light of this law that was clearly established in October 1998, it would have been apparent to reasonable officials in the Police Chiefs' and Sheriffs' positions that their attempts to inhibit Kinney's and Hall's speech on matters of public concern were governed by a *Pickering* analysis. Kinney and Hall were not nearly as removed from the financial benefit afforded by the Police Chiefs' and Sheriffs' enrollment of their officers in Kinney's and Hall's courses as the Police Chiefs and Sheriffs' "bidder" characterization might suggest. Neither Kilgore College nor ETPA instructors such as Kinney and Hall were mere "bidders" in the sense that they lacked a

"pre-existing commercial relationship" of the sort that the Court was concerned about in *Umbehr*—i.e., a relationship that the Police Chiefs and Sheriffs could use to inhibit speech. *See* 518 U.S. at 674 (reasoning that a *Pickering* balancing analysis is appropriate in cases involving the government's independent contractors or providers of regular services as well as its employees because both "type[s] of relationship provide[ ] a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern"). In these circumstances, reasonable officials in the Police Chiefs' and Sheriffs' positions would have understood that they had the power to deny Kinney and Hall significant benefits as ETPA instructors and that it is the existence of that sort of power—and not mere labels describing governmental relationships—that is determinative in First Amendment "denial of benefit" cases. *See O'Hare Truck Serv.*, 518 U.S. at 722 ("Recognizing the distinction [between governmental employees and regular providers of services] would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs."); *Umbehr*, 518 U.S. at 678-79 (declining to create "a bright-line rule distinguishing independent contractors from employees," reasoning that such a rule "would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract for employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake").

Similarly, the Police Chiefs and Sheriffs had employment-type interests in their relationship with Kinney and Hall. Indeed, the Police Chiefs and Sheriffs persuasively

asserted such interests at oral argument. For example, the Police Chiefs and Sheriffs pointed out that the East Texas Police Chiefs' Association founded the ETPA in 1966, that they had been sending their officers to the ETPA for training since then, that they sat on the ETPA's advisory board after the ETPA became a part of Kilgore College, that they worked closely with the training instructors, and that they had a role in designing the ETPA's curriculum. In light of this relationship that the Police Chiefs and Sheriffs had with Kinney and Hall and the controlling Fifth Circuit and Supreme Court precedent at the time of the alleged violation, no reasonable official would have believed that the Police Chiefs' and Sheriffs' use of their relationship with the ETPA to impose restrictions on Kinney's and Hall's freedom to speak on matters of public concern was limited by anything less than a *Pickering* balancing analysis.

The Police Chiefs and Sheriffs also contend that, even assuming it was clearly established that their conduct vis-a-vis Kinney and Hall was governed by the "governmental employee" version of the unconstitutional-conditions doctrine, it was not clearly established that their conduct violated the First Amendment under a *Pickering* balancing analysis. In particular, the Police Chiefs and Sheriffs note that two Texas policies denying benefits to state employees who testified as expert witnesses against the state were in effect in October 1998. *See Hoover v. Morales*, 164 F.3d 221, 223-24 (5th Cir. 1998) (describing the two policies).[23]

23. In *Hoover*, this court affirmed the district court's issuance of a preliminary injunction enjoining the state from enforcing the two policies because we determined them to be overbroad in violation of the First Amendment. 164 F.3d at 227.

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Appendix C

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In arguing that the unlawful nature of the Police Chiefs' and Sheriffs' conduct was not clearly established at the time of the alleged violation, the dissent relies heavily on this court's recognition in *Hoover* that "there may be occasions when the State's interest in efficient delivery of public services will be hindered by a state employee acting as an expert witness or consultant." *Id.* According to the dissent, "considering that, *at the very time [the Police Chiefs and Sheriffs] were acting*, our court left open the possibility that the government could legitimately curtail the First Amendment rights of an employee testifying as an expert witness, it simply cannot be the case that it is *apparent* a reasonable official (sheriff or police chief) would have then known that refusing to send their officers to teachers who have testified as expert witnesses against law enforcement would violate those teachers' First Amendment rights." This conclusion, however, fails as a matter of logic because it proves too much. The fact that we limited our decision in *Hoover* to the two policies at issue, which effectively "prohibit[ed] state employees from acting as consultants or expert witnesses on behalf of parties opposing the State in litigation," 164 F.3d at 223, in no way implies that it would be reasonable for a governmental official to conclude that any other type of governmental restriction on expert testimony adverse to another government entirely is consistent with the First Amendment. Indeed, such a conclusion is inconsistent with *Pickering*, which makes clear that the *Pickering* balancing analysis is a case-specific inquiry:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First

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However, reasonably competent officials do not look to state law to ascertain the federal law governing their conduct. Moreover, we are not persuaded that the existence of these Texas policies demonstrates that a reasonably competent official might have believed that it was constitutional to deny benefits to individuals because of their expert testimony against the government.

Given (1) that it is well-established in the jurisprudence of both the Supreme Court and this court that exposure of misconduct by a governmental official is of great First Amendment significance, and (2) that this court has repeatedly emphasized the need to protect speech exposing police officer misconduct in particular, it would have been objectively unreasonable for an officer to conclude that Kinney's and Hall's testimony bore no significant weight for purposes of a *Pickering* balancing analysis.[24]

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> Amendment protection and the need for orderly school administration *in the context of this case*, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

391 U.S. at 569 (emphasis added).

24. The Police Chiefs and Sheriffs also suggest that a reasonable officer would not necessarily have understood the First Amendment import of Kinney's and Hall's speech because it was in the form of expert testimony. That Kinney and Hall testified as expert witnesses does not diminish the First Amendment interest in ensuring that the speech is uninhibited. Indeed, we concluded as much in *Rainey v. Jackson State College*, 481 F.2d 347 (5th Cir. 1973), where we held

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Moreover, in light of the law clearly established at the time of the alleged violation, no reasonable official in the Police Chiefs' and Sheriffs' position would have believed that exerting pressure on Kilgore College to remove Kinney and Hall from the ETPA faculty could be justified on the grounds that their testimony created a "conflict of interest" and violated amorphous and questionable "principles" such as "personal loyalty" and "cooperative responsibility." Whatever interests lie behind these words, no reasonable officer would have believed that they were legitimate interests in the circumstances of this case, much less that any such interest was sufficient to outweigh the strong First Amendment interest in ensuring that individuals such as Kinney and Hall, who are in the best position to know about official misconduct, are not inhibited from testifying as to official misconduct.[25]

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that the refusal of state university administrators to renew a teacher's contract because he had testified as an expert witness for the defense in a criminal trial established "a clear case of impermissibly freighting the [teacher's] contract with a deprivation of the First Amendment right to free speech." *Id.* at 350.

25. The dissent does not argue that it was not clearly established that the *Pickering* balancing analysis applied to the Police Chiefs' and Sheriffs' alleged conduct, but rather that it was not clearly established that their conduct violated the First Amendment under that analysis. In particular, the dissent maintains that "[t]he majority fails to cite a single case rendered prior to the conduct at issue both dealing with a factually analogous situation and deciding that such conduct violates a First Amendment right." We are convinced that *Umbehr* and *O'Hare Truck Service* are two such cases. Further, even assuming that those two cases are not directly controlling, it is

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Thus, we conclude that the Police Chiefs' and Sheriffs' alleged conduct not only violated a constitutional right, but also, in light of the law clearly established at the time that the conduct occurred, was objectively unreasonable in the particular circumstances of this case.[26] The district court correctly

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unquestionable that the authority clearly established at the time of the alleged violation dictates (1) that Kinney's and Hall's speech—being in the form of judicial testimony and being about official misconduct—is quintessential "First Amendment" speech bearing significant weight for purposes of the *Pickering* balancing analysis, and (2) that enforcing a code of silence, at least in the circumstances that obtained here, is not a legitimate governmental interest. Accordingly, viewing the facts in the light most favorable to Kinney and Hall, and presuming that reasonably competent officers "observe general, well-developed legal principles," *Doe*, 15 F.3d at 455 (citation and internal quotations omitted), we find it manifest that no reasonable officer in the Police Chiefs' and Sheriffs' position at the time of the alleged violation would have determined that it was permissible under the First Amendment to boycott Kinney's and Hall's courses in retaliation for their testimony in an excessive-force case against a police officer who had never trained at the ETPA and a police department that had never enrolled its officers in ETPA courses.

26. Contending that we apply the "clearly established" inquiry only to the question whether the *Pickering* balancing analysis governed the Police Chiefs' and Sheriffs' conduct vis-a-vis Kinney and Hall, but not to the question whether the Police Chiefs' and Sheriffs' conduct violated the First Amendment under that analysis, the dissent maintains that we consequently "conflate[ ] the qualified immunity inquiry into a decision on the merits—whether [the Police Chiefs and Sheriffs] violated a constitutional right." As the foregoing analysis makes clear, however, we conclude that the contours of the

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determined that the Police Chiefs and Sheriffs are not entitled to qualified immunity from Kinney's and Hall's § 1983 claims alleging violations of their rights to freedom of speech under the First and Fourteenth Amendments.

C. The § 1983 Claim Invoking the Right to Due Process of Law Under Fourteenth Amendment

The district court also denied the Police Chiefs and Sheriffs qualified immunity against Kinney's and Hall's § 1983 claims alleging that the Police Chiefs and Sheriffs violated the Due Process Clause of the Fourteenth Amendment.[27] Under Supreme Court jurisprudence, the Due Process Clause's protection of an individual's life, liberty, and property has both a procedural and a substantive component. *See County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). The procedural component requires states to provide constitutionally adequate procedures before depriving an individual of life, liberty, or property, and the

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law were sufficiently clear at the time of the alleged violation that a reasonable official in the Police Chiefs' and Sheriffs' position would have understood *both* that *Pickering* was the governing First Amendment law *and* that, in the circumstances of the instant case, the First Amendment interests in protecting Kinney's and Hall's expert testimony outweighed any legitimate governmental interests in suppressing that speech. We do not, as the dissent suggests, conclude merely that the First Amendment interests did in fact outweigh the governmental interests.

27. The Due Process Clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

substantive component "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotations and citations omitted). Because "[t]he Due Process Clause is only implicated when a person has a constitutionally protected interest in life, liberty, or property," *Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 437 (5th Cir. 2001), such an interest must be established to state a cause of action under both the procedural and the substantive components of the Clause, *see Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 929 n.8 (5th Cir. 1988).

Although Kinney's and Hall's due process claims are ambiguously pled, it appears that they allege violations of the procedural, rather than the substantive, component of the Clause. In support of their due process claim, Kinney and Hall allege that the Police Chiefs and Sheriffs "blackballed [them] and cost them their jobs without providing any process at all." More specifically, Kinney and Hall note that the Police Chiefs and Sheriffs "refused to even listen to [them] when Dr. Holda set up a meeting." However, regardless whether their claim is based on substantive or procedural due process (or both), Kinney and Hall have failed to allege that they have been deprived of a life, liberty, or property interest.

Kinney and Hall contend, and the district court agreed, that they had "property interests in their continued employment at the Academy." *Kinney*, 111 F. Supp. 2d at 839. The property interests protected by the Due Process Clause " 'are created and their dimensions are defined by existing rules or understandings that stem from an

independent source such as state law.' " *Conner*, 267 F.3d at 437 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Under Texas law, "the employment relationship is generally at-will unless the parties enter into an express agreement that provides otherwise." *City of Midland v. O'Bryant*, 18 S.W.3d 209, 215 (Tex. 2000). Because Kinney and Hall had one-year employment contracts, they were not at-will employees. Thus, they had a property interest in their employment as long as one of these contracts was in effect. However, Kinney and Hall apparently do not rely on these contracts as the source of their asserted property interest. Instead, they apparently assert a property interest in their "continued employment," i.e., the *renewal* of their contracts.[28]

The Police Chiefs and Sheriffs contend that because Kilgore College was not obligated to renew Kinney's and Hall's contracts each year, their continued employment from one year to the next was at-will. Thus, the Police Chiefs and Sheriffs assert, Kinney and Hall had no property interest in their "continued employment" within the meaning of the Due Process Clause. Kinney and Hall do not dispute that their employment from one contract to the next was at-will. Rather, they point to the "unconstitutional-conditions" doctrine, which establishes that "even though a person has no 'right' to a valuable governmental benefit and even though the

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28. Kinney continued to work under the contract in effect at the time that the boycott began until that contract expired. Although Hall resigned approximately seven months before his contract would have expired, he, like Kinney, does not allege that he was deprived of a property interest in employment established by that one-year contract, but rather that he was deprived of an interest in continued employment at the ETPA in future years.

government may deny him the benefit for any number of reasons, ... [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry*, 408 U.S. at 597. According to Kinney and Hall, the unconstitutional-conditions doctrine thus prevents the Police Chiefs and Sheriffs from effectively denying Kinney and Hall the benefit of contract renewal on grounds that violate constitutionally protected interests. However, where the Due Process Clause is the source of constitutional protection invoked, the only property interests that are "constitutionally protected" are those that are created by some independent source, such as state law.

Kinney and Hall do not allege that their continued employment at the ETPA was a property interest derived from state law or some other source independent of the Constitution. Accordingly, for the purpose of this appeal, we assume without deciding that Kinney and Hall have not asserted a property interest established by state law or some similarly independent source. In the absence of such an assertion, their alleged "property interests" in continued employment are not sufficient to trigger the protections of the Due Process Clause.

Because we conclude that Kinney and Hall have not stated a violation of their Fourteenth Amendment right to due process of law, we need not engage in the "clearly established" inquiry of qualified-immunity analysis.[29]

29. At oral argument, Kinney and Hall appeared to suggest that the Police Chiefs' and Sheriffs' "blackballing" and the resulting harm to their professional reputations may somehow render their property

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Accordingly, we reverse the district court's summary judgment order denying the Police Chiefs and Sheriffs qualified immunity from Kinney's and Hall's § 1983 due process claims.

V. TEXAS LAW "OFFICIAL IMMUNITY"

Finally, the district court denied the Police Chiefs and Sheriffs "official immunity" against Kinney's and Hall's state-law claims of tortious interference with business relations. "[O]rders premised on the denial of qualified immunity under Texas state law are appealable in federal court to the same extent as district court orders premised on the denial of federal law immunity." *Cantu v. Rocha*, 77 F.3d 795, 804 (5th Cir. 1996). Accordingly, we have supplemental jurisdiction over the legal questions presented by the Police Chiefs' and Sheriffs' appeal of the district court's denial of state law immunity. *See id.*; *see also supra* Part II.

Texas law provides government officials with "official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). It is undisputed that the Police Chiefs and Sheriffs had

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interest adequate for purposes of the Due Process Clause. However, in *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court held that an interest in "reputation," at least when unaccompanied by deprivation of a property or liberty interest grounded in state law, does not amount to a liberty or property interest protected by the Due Process Clause. *See id.* at 701, 711-12.

authority to decide where and by whom their respective agencies' officers were trained, and that such decisions were among the Police Chiefs' and Sheriffs' discretionary duties. The issue in contention is whether they acted in good faith in refusing to enroll their officers in Kinney's and Hall's courses. *See Kinney*, 111 F. Supp. 2d at 844.

The "good faith" standard established by the Texas Supreme Court "is derived substantially from the test that has emerged under federal immunity law for claims of qualified immunity." *Chambers*, 883 S.W.2d at 656. Like qualified immunity, the good-faith standard focuses on the objective legal reasonableness of the officer's conduct. Officers are presumed to have acted in good faith if they are able to show that a reasonably prudent officer in the same or similar circumstances could have believed that the conduct in question was justified. *Id.* at 656-67. To rebut this presumption of good faith, "the plaintiff must show that no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." *Id.* at 657 (internal quotations omitted). However, Texas law official immunity differs from qualified immunity in that the good-faith test does not depend on whether the right was clearly established at the time of the alleged violation. *Id.*

Appendix C

The Police Chiefs and Sheriffs argue that they acted in good faith because "a reasonable officer could have believed that expressing his concerns to Dr. Holda and changing the training of his officers to meet those concerns was reasonable." However, in applying the good-faith test of official immunity, Texas courts assume the *plaintiff's* version of the facts to be true. *O'Bryant v. City of Midland*, 949 S.W.2d 406, 412 (Tex. App.-Austin 1997), *rev'd on other grounds*, 18 S.W.3d 209, 216 (Tex. 2000). Thus, the Police Chiefs and Sheriffs must show that a reasonable officer could have believed that denouncing Kinney and Hall in various communications to Holda (by letter as well as in person) and boycotting Kinney's and Hall's courses were justified because of their expert testimony against law enforcement. The Police Chiefs and Sheriffs have failed to make such a showing. For the reasons that we stated above in determining that the Police Chiefs and Sheriffs are not entitled to qualified immunity against Kinney's and Hall's free speech claims, we conclude that no reasonable officer in the Police Chiefs' and Sheriffs' position could have believed that the alleged conduct was justified. The district court correctly denied the Police Chiefs and Sheriffs official immunity from Kinney's and Hall's state tort claims.

Appendix C

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's summary judgment denying the Police Chiefs and Sheriffs qualified immunity from Kinney's and Hall's § 1985(2) claims, their § 1983 claims invoking their rights to freedom of speech, and their state tort claims. However, we REVERSE the district court's denial of qualified immunity on Kinney's and Hall's § 1983 claims invoking their Fourteenth Amendment rights to due process of law. Finally, as explained above, we DISMISS the appeals of the cities, counties, and East Texas Police Chiefs' Association.[30] Accordingly, we REMAND the case to the district court for entry of judgment in favor of the Police Chiefs and Sheriffs on the § 1983 due process claims and for trial on the remaining claims. The Police Chiefs and Sheriffs (the individual Defendants-Appellants) shall bear the costs of this appeal.

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30. *See supra*, note 7.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, LUFKIN DIVISION DATED MAY 12, 2000 AND FILED MAY 16, 2000

IN THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Case No. 9:99-CV-77

DEAN KINNEY and DAVID HALL

Plaintiffs

vs.

BOBBY WEAVER, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, Dean Kinney and David Hall, brought this action alleging that the Defendants[1] violated: (1) 42 U.S.C.

1. There are 15 defendants. This number includes various individuals as well as municipalities. The named municipality defendants are the (1) City of Tyler, (2) City of Kilgore, (3) City of Marshall, (4) Smith County, (5) Harrison County, (6) Gregg County, and the (7) City of Nacogdoches. The named individuals are: (8) Sheriff Bobby Weaver of Gregg County, (9) Sheriff J.B. Smith of Smith County, (10) Sheriff Bob Green of Harrison County, (11) Police (Cont'd)

§ 1983 by retaliating against the plaintiffs for speaking out about a matter of public concern; (2) 42 U.S.C. § 1985 by conspiring to intimidate witnesses; (3) the plaintiffs Fourteenth Amendment rights to Due Process; and (4) Texas state law by tortiously interfering with the plaintiffs' business. Defendants have moved for summary judgment contending that the law and facts do not create a cause of action, and, in the alternative, that the various defendants are entitled to qualified immunity. For the reasons explained below, the motion is denied.

I. BACKGROUND

The circumstances surrounding this case are the subject of some disagreement. Both sides have developed theories about these circumstances and what they mean. Generally, the court is not concerned with "theories." To the extent these "theories," are found in the record as either direct or circumstantial evidence the court will consider them. However, to the extent they are merely speculation or conclusory allegations they have no part in the consideration of a motion for summary judgment. On a motion for summary judgment, the court is only concerned about whether genuine issues of material fact exist. From the record before the court now, these basic facts have been established.

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Chief of Nacogdoches Ted Gibson, (12) Director of Public Safety of Kilgore Ronnie Moore, (13) Tyler Police Chief W.A. "Bill" Young, (14) City of Marshall Police Chief Charles Williams. The lone entity named is the (15) East Texas Police Chief's Association.

Appendix D

Plaintiffs were both instructors at the East Texas Police Academy at Kilgore College in Kilgore, Texas. In August 1999, the plaintiffs both testified as expert witnesses against a police department in an excessive force/police misconduct case in Kerrville, Texas. The plaintiffs did not train any of the policemen or agencies involved in the Kerrville case. Some time after the plaintiffs testified, the problems, which are at the heart of this case, arose.

Previous to the two plaintiffs testifying in the Kerrville case, the defendant cities and counties had sent law enforcement officers and cadets to the East Texas Police Academy for basic training and continuing education. There was no contract requiring the defendants to do this. After the plaintiffs testified as experts, many of the defendants expressed their displeasure about this to Dr. William Holda, the president of Kilgore College. Defendant Moore wrote Dr. Holda stating that the plaintiffs' actions "seem[ ] to reflect a growing trend of some of your personnel to be gaining profit from garnering evidence and providing testimony against other Police Officers and Departments. . . ." Defendant Chief Williams wrote Dr. Holda and stated "I think it is deplorable to think that instructors for our Police Academy hire themselves out as an expert witness: *AGAINST* law enforcement agencies." Defendant Young also wrote Dr. Holda about Kinney and Hall where he stated that he thought the plaintiffs' expert testimony could become a conflict of interest.[2] Meetings between Dr. Holda and the defendants took place.

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2. Defendant Young wrote:

> Mr. Hall and Mr. Kinney's positions with Kilgore Junior College and their "expert testimony for hire" part time jobs constitute, in my mind, a major conflict of interest.

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Appendix D

At a meeting for the defendant East Texas Police Chiefs' Association, the situation about the plaintiffs was discussed in detail. The minutes of the meeting reflect this. They state in pertinent part:

> Chief Young stated that the Chiefs and Sheriffs did not want the two instructors fire[d] only that they not be allowed to instruct police officers or cadets. Chief Young stated that he was not going to send any of his officers to any schools taught by Dean Kinney or David Hall. This point was repeated by several other Chief[s] and Sheriffs present including Chief Chuck Williams [from] Marshall P.D., Ronny Moore from Kilgore P.D., Ted Gibson from Nacogdoches P.D., Sheriff Bobby Weaver from Gregg Co. S.O. and others.
>
> . . . . .
>
> Chief Ted Gibson then stated that he was deeply concerned about the quality of the instruction given by the two Kilgore Academy instructors. Chief Gibson also stated that he was not going to send any of his officers to any school taught by

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> It is not our preference to have these two instructors teach our officers and also engage in legal combat with them in the judicial system. This matter will force us to consider alternative methods to achieve our training needs if not resolved as soon as possible.

Def's Exhibit 9.

> the two instructors. He also felt that it should be up [to] the Chiefs to pick and choose the service they receive from Kilgore Academy and it should be up to the Academy to deliver that service. At that point it was agreed that none of the Chiefs or Sheriffs present would send their officers to any classes taught by either Dean [Kinney] or David Hall.

In media reports, some of the defendants made negative remarks about the plaintiffs' testimony. *See* Pl's Exhibit 70, videotape. Some of the defendants have admitted that they would not send their students to classes taught by the plaintiffs because of their expert testimony. *See* Williams Dep. p. 49, ln. 13 through pg. 50, ln. 5; Minutes of East Texas Police Chiefs Association.

The plaintiffs contend that the record reflects the defendants "blackballed" or boycotted the plaintiffs' classes at the Academy because the plaintiffs broke the "code of silence." The "code of silence" the plaintiffs refer to is the unwritten code that police officers should not testify against other police officers.[3] Defendant Weaver during a tv interview referred to an "unwritten code" that the plaintiffs had violated by testifying as experts. It is the plaintiffs' position that this boycotting is a violation of the laws cited above.

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3. The code of silence is discussed in *Snyder v. Trepagnier*, 142 F.3d 791, 797 & n.6 (5th Cir. 1998). An expert in that case testified that the code of silence is "a code within the police department that, regardless what behavior, one police officer does not report or testify against another police officer." *Id.* at n.6.

The defendants, on the other hand, have maintained that they refused to send their officers to classes taught by Kinney and Hall because of potential conflicts of interests. The defendants maintain that it is a conflict of interest for the plaintiffs to testify against other police officers in the State of Texas since it is conceivable that some of the students in the East Texas Police Academy may work in those jurisdictions where the plaintiffs testify as experts. In support of this, the defendants point to a letter Dr. Holda wrote to the plaintiffs. Dr. Holda's letter was written after he met with many of the defendants to discuss their concerns about the plaintiffs' teaching abilities. The letter demonstrates that Dr. Holda felt that most of the defendants' concerns focused on a potential conflict of interest that may arise if the plaintiffs testified as experts in a case involving any of the defendant police agencies.

The parties have completed discovery and presented their arguments to the court. The record is full of evidence, both circumstantial and direct, backing each of the respective party's positions. After reviewing the record and the arguments of the parties, the court concludes that summary judgment is not appropriate and this case may proceed to trial.

II. STANDARD OF REVIEW

It is well-settled that a motion for summary judgment can be granted only if the matters considered by the court clearly demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); FED. R. CIV. P. 56(c). It is equally well-settled that the burden of proving that "no genuine issue of material fact exists," rests with the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). If the moving party meets this threshold, the burden shifts to the nonmoving party to demonstrate with significant probative evidence that there exists a genuine issue of fact to be tried. *Kansa Reinsurance v. Congressional Mort. Corp.*, 20 F.3d 1362, 1371 (5th Cir. 1994); *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994). Only evidence, not unsworn pleadings, memoranda or the like, will satisfy this burden. *Larry v. White*, 929 F.2d 206, 211 n.12 (5th Cir. 1991). If the opposing party bears the burden of proof at trial, the moving party need not submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991). Summary judgment is only proper when a rational jury, looking at the record as a whole, could not find for the nonmoving party. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). In making this assessment, factual controversies are to be resolved in favor of the nonmoving party. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam).

The court concludes that summary judgment is not proper in this case because there are genuine issues of material fact in each one of the plaintiffs' claims. Thus, the defendants have not met their burden. Moreover, the defense of qualified immunity does not prohibit this case from proceeding to trial.

Appendix D

III. ANALYSIS

A. Qualified Immunity

The individual defendants have asserted the defense of qualified immunity against all of the plaintiffs' federal causes of action. The "qualified . . . immunity doctrine was established to reconcile two competing interests. One interest is the compensation of persons whose federally protected rights have been violated. Opposing this is the fear that personal liability will inhibit public officials in the discharge of their duties." *Johnston v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994). Accordingly, public officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In order to establish that the defendants are not entitled to qualified immunity, plaintiffs must satisfy a three-part test. *See, e.g., Morris v. Dearborne*, 181 F.3d 657, 665 (5th Cir. 1999). First, "[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of a constitutional right at all." *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *see also Morris*, 181 F.3d at 665. Second, the court must decide "whether that right was clearly established at the time of the alleged violation." *Wilson*, 526 U.S. at 609. Third, the court "must determine whether the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the defendant actually engaged in the

conduct that violated the clearly-established right." *Morris*, 181 F.3d at 666 (quoting *Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir. 1999)). Finally, "[i]f it is determined that the official's conduct was unconstitutional, then the court must decide whether the conduct was nonetheless 'objectively reasonable.' " *Kipps v. Caillier*, 197 F.3d 765, 768 (5th Cir. 1999) (citing *Eugene v. Alief Indep. School Dist.*, 65 F.3d 1299, 1305 (5th Cir. 1995)), *reh'g granted* by 205 F.3d 203.[4]

1. *Deprivation of a Constitutional or Statutory Right*

The plaintiffs have satisfied the first part of the qualified immunity test because it is clear from both the evidence in the record and the plaintiffs' complaint that the plaintiffs have adequately alleged the deprivation of both a constitutional right and a statutory right. The plaintiffs have submitted evidence demonstrating that their constitutional right to a property interest under the Due Process Clause was deprived as a result of the alleged boycott. Furthermore, the record reflects that the plaintiffs' rights under 42 U.S.C. § 1985 and the First Amendment have also been deprived.

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4. The Fifth Circuit has not been consistent in its analysis of qualified immunity. *Compare Jones v. City of Jackson*, 203 F.3d 875, 879-80 (5th Cir. 2000) (using a two step test) *with Wallace v. Wellborn*, 204 F.3d 165, 167 (5th Cir. 2000) (using a three step test). Some cases refer to this as a two part test by combining the deprivation of a "constitutional or statutory right" prong and the "clearly established" prong together. *See Shipp v. McMahon*, 199 F.3d 256, 261-62 (5th Cir. 2000). This slight difference in phrasing does not affect this court's analysis of the underlying issues.

Appendix D

a. Plaintiffs' Rights Under 42 U.S.C. § 1985

The defendants have argued that the plaintiffs do not have a claim under either the Due Process clause or under § 1985. The defendants reason that § 1985 does not apply to voluntary expert witness testimony. The court disagrees. The language of the statute is clear, it reads in relevant part:

> (2) If two or more persons . . . conspire to deter, by force, intimidation, or threat, *any* party or *witness* in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . .
>
> (3) . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985 (emphasis added). Section 1985 clearly applies to expert witnesses and the defendants have not cited a single case to the contrary. The statute explicitly states that it is unlawful to conspire to deter "any" witness from testifying in any court of the United States.

The defendants have argued that only fact witnesses can testify "freely, fully, and truthfully," thus, the defendants conclude expert testimony does not qualify for protection under the statute. However, the statute does not speak in terms of "fact" witnesses or "opinion" witnesses. The statute only

states that "any" witness who testifies must give truthful testimony. Expert witnesses take the same oath that non-experts take. That is, that they swear to tell the *truth* and nothing but the *truth*. Therefore, the court concludes that the plaintiffs have submitted sufficient evidence that their statutory rights have been deprived under § 1985. *See Chalal v. Paine Webber, Inc.*, 725 F.2d 20, 22-24 (2d Cir. 1984) (discussing how the term "witness" is not defined and holding that a potential expert witness who was not called to testify qualified for protection under the statute).

b. Plaintiffs' Rights to be Free from Retaliation

The court concludes that the plaintiffs' First Amendment claim under 42 U.S.C. § 1983 also sufficiently alleges the deprivation of a constitutional right. For a First Amendment retaliation claim to be valid the record must demonstrate that: "(1) the employee suffered an adverse employment decision; (2) the employee's speech involved a matter of public concern; (3) the employee's interest in commenting on matters of public concern outweighs the defendants' interest in promoting efficiency; and (4) the employee's speech must have motivated the defendants' action." *Lukan v. North Forest ISD*, 183 F.3d 342, 346 (5th Cir. 1999) (citing *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999)); *see also Benningfield v. City of Houston*, 157 F.3d 369, 375 (5th Cir. 1998).

First, it is clear from the record that both plaintiffs have suffered adverse employment actions. "Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Pierce v. Texas Dep't of Crim.*

Justice, 37 F.3d 1146, 1149 (5th Cir. 1994) (citing *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994)). Because of the alleged boycott very few, if any, officers signed up to take classes taught by the plaintiffs Kinney and Hall. As a result of the boycott, Kinney was reassigned from the East Texas Police Academy to the criminal justice department of Kilgore College. Kinney is paid approximately $15,000.00 less per year at this new position. *See* Kinney Aff. at ¶ 12; Holda Aff. at ¶ 16. Plaintiff Hall could not afford to take such a pay cut and he resigned from the East Texas Police Academy. He now works for the City of Carrollton Police Department. *See* Hall Aff. at ¶¶ 2, 36; Holda Aff. at ¶ 17. These actions are the equivalent of a demotion since both Kinney and Hall are now earning substantially less than they were before the alleged boycott took effect.

Second, there can be little doubt that the plaintiffs' testimony in the Kerrville case involved a matter of public concern. The defendants wisely have not focused their arguments on this issue. In Kerrville, the plaintiffs testified about the excessive use of force by police officers. The law books are full of excessive force cases. Political candidates in various parts of the country focus on reforming police department procedures as part of their campaign platforms. Currently, there is a national debate over whether federal authorities should have entered Elian Gonzalez's uncle's home in Miami with guns drawn in order to return the boy to his father. Thus, there can be little doubt that law enforcement's use of excessive force is a matter of public concern.

Appendix D

To satisfy the third element a plaintiff must demonstrate that his interest in commenting on matters of public concern outweighs the defendants' interest in promoting efficiency. This is known as the *Pickering* balancing test. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Individuals will have a hard time succeeding in an excessive force case without the assistance of experts who are intimately acquainted with police procedures. Because of this, the court concludes that Hall and Kinney had a significant interest in testifying about excessive force in the Kerrville case. The court cannot fathom how this interest could possibly be outweighed by the defendants' interest in promoting efficiency. Contrary to the defendants' arguments, there is nothing inefficient about having two instructors testify about excessive force in a case hundreds of miles away from the Academy in which they teach.

Finally, the record demonstrates that the plaintiffs' speech motivated the decision to boycott their business. None of the defendant law enforcement agencies ever reported having any problems with either Kinney or Hall until they testified as experts for the plaintiffs in Kerrville. Hence, it is quite clear that the plaintiffs' speech motivated all of the defendants' subsequent actions.

The defendants have argued that there can be no First Amendment claim because the defendants did not have a contractual relationship with the plaintiffs. Nevertheless, as will be discussed in further detail in the "clearly established" prong of the qualified immunity test, this is irrelevant. The defendants cannot do indirectly that which they could not do directly. Obviously, the defendants could

not fire one of their own employees for speaking out about a matter of public concern (assuming the plaintiff establishes the *Pickering* balance test in his/her favor). Therefore, it seems a logical extension of this principle to conclude that the defendants cannot "boycott" a business in the hopes that two of that businesses's employees would be fired or reassigned because of the economic harm imposed on that business.

There is ample evidence currently in the record for a jury to conclude that the defendants' actions were intended to suppress the plaintiffs' rights to free speech. Moreover, summary judgment should be used "most sparingly in . . . First Amendment case[s] . . . involving delicate constitutional rights, complex fact situations, disputed testimony, and questionable credibilities," *Porter v. Califano*, 592 F.2d 770, 778 (5th Cir. 1979), all of which are present here.

c. Plaintiffs' Rights under the Due Process Clause

The Due Process Clause prevents governmental entities from depriving a person of life, liberty, or property without due process of law. The plaintiffs' claims under the Due Process clause are related to their First Amendment claims. The plaintiffs have submitted sufficient evidence to demonstrate that their property interests in their continued employment at the Academy have been deprived due to the alleged boycott.

The defendants have asserted that the plaintiffs do not have a property interest in their employment because Texas is an at-will employment state. The defendants further argue

that they could not have deprived the plaintiffs of their Due Process rights because they did not employ the plaintiffs, Kilgore College did.

The court finds these arguments unpersuasive. The record demonstrates that the plaintiffs' livelihood has been taken away since no students will attend their classes due to the alleged boycott. The defendants refused all efforts by the plaintiffs to meet and discuss the alleged conflict of interest. The record, when read in a light most favorable to the plaintiffs, is clear that the defendants refused to send students to the plaintiffs' classes. While it is true that public entities may discharge employees unprotected by a reasonable expectation of continued employment for any job-related reason or for no reason at all, it is not true that they may do so for a reason which infringes "constitutionally protected rights." *Brantley v. Surles*, 718 F.2d 1354, 1358 (1983) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The fact that the defendants did not technically employ the plaintiffs is immaterial. The defendants had the power to run the plaintiffs out of business since they could choose which instructors taught the classes in which their officers enrolled. *See, e.g., Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126 (1992) (stating that "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression") (quotation omitted). Thus, the court concludes the plaintiffs have adequately supported a claim for violation of Due Process rights.

Appendix D

2. *Were these Rights Clearly Established?*

As noted above, government officials performing discretionary functions generally are granted qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. In *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), the Supreme Court explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be established." Furthermore, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Thus, the analysis focuses on specific facts and not on the right in the abstract, but "the very action in question [need not] ha[ve] previously been held unlawful." *Id.* The Court has further clarified this by adding that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (alteration in original; internal quotation marks omitted); *Kipps v. Caillier*, 205 F.3d 203, 205-06 (5th Cir. 2000) (holding that an assistant football coach alleged the violation of a clearly established right for familial relationships when he was terminated because his son chose to play football for another university even though there was no case directly on point). Therefore, all that is needed is that, "in the light of the preexisting law[,] the unlawfulness

must [have] be[en] apparent." *Anderson*, 483 U.S. at 640;[5] *Shipp*, 199 F.3d at 262 ("to show that a right is clearly established, the plaintiff does not have to refer to precedent that is directly on point, or that declares that the conduct in question is unlawful. Rather, the right is clearly established if based on preexisting law, the unlawfulness of the conduct in question is apparent.") (citations omitted).

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5. This does not mean that

> a single level of specificity [is] sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . . But general statements of the law are not inherently incapable of giving fair and clear warning. . . . [T]he easiest cases do not even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.

Lanier, 520 U.S. at 271 (internal citations and quotation marks omitted). The Supreme Court in *Wilson v. Layne*, 526 U.S. 603, 617 (1999) addressed the situation of when a higher factual particularity may be needed. In *Wilson*, the Court held that bringing reporters into a home during the execution of a search warrant did not violate clearly established law. The Supreme Court relied partly on the fact that the plaintiffs could not cite any cases in their controlling jurisdiction or a consensus of other cases that a reasonable officer could not have believed his actions were lawful. *Id.* This court does not read that opinion as requiring case law from a plaintiffs' controlling jurisdiction or a consensus of cases elsewhere as requirements to overcome the clearly established prong. *See Shipps*, 199 F.3d at 262 (discussing the clearly established prong).

Appendix D

This court has little trouble in concluding that each of the plaintiffs' rights which were allegedly deprived by the defendants were clearly established at the time of the alleged violation. First, § 1985 is clear in its intentions. The statute states that two or more persons shall not conspire to deter any witness from testifying in court. There is ample evidence in the record for a jury to conclude that the defendants conspired to deter the plaintiffs from testifying in court by boycotting their business.

This evidence includes: statements by at least one of the defendants to the news media that the plaintiffs "prostituted" themselves by testifying as experts. *See* Pl's Exh. 70 (videotape of various news reports). The meeting by some of the defendants with Dr. Holda where some of the defendants threatened to stop sending cadets to any classes taught by the plaintiffs. *See* Holda Aff. at ¶¶ 10-12, Young dep. at p. 65, ln. 22 through p. 66 ln. 9. The minutes of the East Texas Police Chief's Association where the plaintiffs' actions and what to do about them were discussed at length.

Although there may not be a *white horse* case holding that police officers should not conspire to deter expert witnesses from testifying by boycotting their business, this court is confident that some of the most respected law enforcement officials in all of East Texas should have known that doing so violated the statute.

Similarly, numerous cases have held that governmental entities cannot do indirectly that which they cannot do directly. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (holding that the First Amendment protects

an independent contractor from termination or prevention of the automatic renewal of his at-will government contract in retaliation for exercising his freedom of speech); *El Dia, Inc. v. Rossello*, 165 F.3d 106, 109 (1st Cir. 1999) (holding that a government could not withdraw advertising from a newspaper which published articles critical of that administration because it violated clearly established First Amendment law prohibiting retaliation for the exercising of freedom of speech); *North Mississippi Communications v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986) (same). The defendants violated clearly established Due Process and First Amendment law by boycotting the plaintiffs' business in an effort to get them removed from the college.

The First Circuit reasoned in *El Dia* that "clearly established law prohibits the government from conditioning the revocation of benefits on a basis that infringes constitutionally protected interests, and from terminating an independent contractor such as El Dia in retaliation for exercising its First Amendment rights." 165 F.3d at 110 (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) and *Umbehr*, 518 U.S. at 674). This reasoning applies equally to the facts of this case.

The plaintiffs in this case are the equivalent of a governmental independent contractor since they were hired by the defendants to train their officers. Governmental entities cannot retaliate against independent contractors who exercise their freedom of expression to the dismay of the government officials. *Umbehr*, 518 U.S. at 674. In *Umbehr*, the Supreme Court noted that "constitutional violations may arise from

the deterrent, or 'chilling' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights . . . the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Id.* (citations omitted, alteration in original). This is exactly what allegedly occurred in the case *sub judice.* The defendants were undoubtedly aware of the fact that Kilgore College could not terminate the plaintiffs for exercising their First Amendment rights. Yet, the defendants attempted to indirectly accomplish this result by refusing to send students to the classes taught by the plaintiffs. Simply put, there is evidence in the record demonstrating that the defendants set in motion events that they should have foreseeably seen would cause the deprivation of Kinney and Hall's constitutional rights. *See, e.g., Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir. 1999) (stating that a plaintiff must prove the defendant "set in motion events that would foreseeably cause the deprivation of Plaintiffs' constitutional rights" and then finding a § 1983 violation when a teacher provided false information to a court which then removed a child from her parent's care). Thus, this court concludes that the defendants violated clearly established First Amendment and Due Process law by allegedly boycotting the plaintiffs' business in retaliation for them testifying as expert witnesses against another police department.

The defendants claim that if they violated any laws, those laws were not clearly established at the time the violations occurred. The defendants primarily rely on two cases in support of their argument. *See Tedder v. Norman*, 167 F.3d

1213 (8th Cir. 1999); *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998). In *Hoover*, the Fifth Circuit held that a rider to the 1997 appropriations bill in the Texas Legislature and a university employment policy which prohibited university professors from being expert witnesses against the state was unconstitutional. 164 F.3d at 226. The *Hoover* court held the state's interest in preventing state employees from speaking in a manner contrary to the state's interest did not outweigh the free speech rights of the professors, especially as applied to expert testimony. *Id.* ("The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment.").

The defendants point to two sections of this opinion which they believe help their cause. The first is that the *Hoover* court specifically recognized that "[w]e may safely assume that there will be occasions when the State's interest in efficient delivery of public services will be hindered by a state employee acting as an expert witness or consultant." *Id.* at 226. In the defendants' opinion, this case raises such an occasion. The court respectfully disagrees. The present defendants have not identified any instances where the "efficient delivery of public services" would be hindered by the plaintiffs testifying as experts in Kerrville. The defendants assert that there is a conflict of interest in the plaintiffs' testimony. The court is not so convinced. It is hard to imagine how testimony in a case some 430 miles from the Academy interrupts the "efficient delivery of public services." The testimony the plaintiffs gave in Kerrville did not change the format of the classes they were teaching in Kilgore by any

degree. The Fifth Circuit has not defined the situations in which the "efficient delivery of public services" may be disturbed. Whatever those situations may be, this court is confident they are not present here.

The defendants also claim that Judge DeMoss's concurrence supports their argument in favor of qualified immunity. In his concurrence, Judge DeMoss stated "In my view this case raises a serious and fundamental issue not previously decided by the United States Supreme Court or this Court." The defendants reason that this statement demonstrates that there is no possible way they could have violated clearly established law by allegedly boycotting the plaintiffs' business. This argument fails for two reasons. First, the alleged boycott continues to this day. Thus, at the very least, it was clearly established on December 31, 1998, the date of the *Hoover* opinion, that it was unconstitutional for governmental employers to suppress freedom of speech simply because one of their employees was testifying as an expert against the state.

Second, Judge DeMoss's statement that this was a case of first impression was directed at the particular policy and rider bill at issue in that case. *See* 164 F.3d at 221. His concurrence was not dealing with the situation presented here—an alleged retaliation against police instructors who testified against a police department located several hundred miles away from the students they taught. This is made clear by reading Judge DeMoss's opinion in context. Judge DeMoss stated in applicable part:

> In my view this case raises a serious and fundamental issue not previously decided by the United States Supreme Court or this Court. *That is, whether the State of Texas or one of its state universities can prohibit a state employee or a full-time professor at the university from serving as a compensated expert witness against the state when the subject matter of his testimony and the basis of his qualifications as an expert are directly connected with, and are the product of, his employment by the state.* That issue was expressly left undecided by the Supreme Court in *National Treasury Employees* and needs far more factual development and legal analysis by the parties and the Court than it has received on the hearing for preliminary injunction.

164 F.3d at 228 (emphasis added). Hence, it is clear to this court that Judge DeMoss was not referring to the situation at hand.

The second case relied upon by the defendants is equally inapplicable. The defendants have cited *Tedder*, 167 F.3d 1213 (8th Cir. 1999) for the proposition that the interests of the defendants outweigh any interests the plaintiffs had in testifying as experts in the Kerrville case. In *Tedder*, a deputy director of a state law enforcement training academy was demoted after he gave voluntary deposition testimony for a plaintiff in an excessive force case against a police department. 167 F.3d at 1214. The Eighth Circuit held that when the plaintiffs' right to free speech was balanced against the state's legitimate interest in regulating the speech of its

employees it became clear that the state's interests prevailed. *Id.* at 1215. The court noted that the plaintiff's testimony posed a significant threat of disruption to the relationships between the state training academy and the law enforcement agencies that it trained. *Id.*

No such disruption exists in this case. In *Tedder*, the plaintiff worked for an Academy which actually trained the department he was going to be testifying against. Here, by contrast, the plaintiffs' testified against a police department located in an entirely different part of the state than the one in which they trained officers. *Tedder* cannot be read to allow the dismissal of municipal defendants when the same factors are not present. This court believes that under the facts of this case, the plaintiffs' interests in speaking out about police abuse outweigh the state's interest in maintaining the efficiency of its operations. There are genuine issues of fact remaining in this case as to whether the plaintiffs' expert testimony could legitimately cause any disruptions in the defendants' operations. Moreover, it must be determined whether these disruptions, if any, were the result of a perceived "conflict of interest" or the "blackballing" of plaintiffs for turning against one of their own.

This court is persuaded that the heads of various law enforcement agencies located throughout East Texas knew that boycotting an individual's business because that person exercised their rights under the First Amendment to speak out against excessive use of force violated clearly established law. The court concludes that the allegations of the plaintiffs raise genuine issues of material fact with regards to whether clearly established law was violated. Thus, the issue may be

presented to a jury. *See Snyder v. Trepagnier*, 142 F.3d 791, 799-800 (5th Cir. 1998) ("if . . . there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.") (citing *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993)); *Brown v. Doe*, No. Civ. A. 98-99, 1999 WL 1243057 at *4 (E.D. La. Dec. 21, 1999) (stating that qualified immunity issues are routinely sent to a jury when genuine issues of material fact exist).

3. *Objective Reasonableness*

The third step of the qualified immunity analysis is to evaluate the objective reasonableness of the alleged conduct in light of legal precedent. *See Kipp*, 205 F.3d at 206, and 197 F.3d at 768. As discussed above, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). However, "the very action in question [need not] ha[ve] previously been held unlawful." *Id.; see also Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."). Generally, "objective reasonableness is a matter of law for the courts to decide, not a matter for the jury." *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999).[6] "Whether the defendants' conduct was

6. This statement seems to conflict with some other authority in the Fifth Circuit. For example, in *Snyder*, 142 F.3d at 799-800 the Fifth Circuit recognized that under appropriate circumstances a claim

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objectively reasonable depends on the circumstances controlling the defendants as well as clearly established law in effect at the time of the defendants' actions." *Shipp*, 199 F.3d at 262. The objective reasonableness inquiry is "conducted without regard for the law enforcement officer's actual state of mind or subjective motivations." *Fontenot v. Cormier*, 56 F.3d 669 (5th Cir. 1995).

As mentioned above, at the time of the defendants' actions the law was clearly established that it was unlawful for governmental entities to boycott a business merely because that business's proprietors had spoke out about a matter of public concern. There is enough circumstantial evidence in the record for this court to conclude that it was not objectively reasonable for the defendants to violate this clearly established right. While it is true that the defendants are allowed to express their own opinions publicly about the plaintiffs' expert testimony, it does not follow that the defendants can organize a boycott and economically retaliate against the plaintiffs for exercising their own First Amendment rights. The court is confident that, given the law

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of qualified immunity may be submitted to a jury in its entirety. *See also Goodson v. City of Corpus Christi*, 202 F.3d 730, 739 (5th Cir. 2000) (affirming a denial of summary judgment because genuine issues of material fact existed as to whether police officers had an objectively reasonable belief that an individual fit the description of a criminal suspect). Some district courts in this circuit have followed this line of reasoning and submitted the question of objective reasonableness to a jury. *See Brown*, 1999 WL 1243057 at *4 ("This court cannot assess on summary judgment whether Officer DiMarco's actions were reasonable, making summary judgment inappropriate.").

at the time and the circumstances of this case, no reasonable law enforcement official would have thought it objectively reasonable to organize a boycott like the one which allegedly occurred here.

B. Immunity Under the State Law Claim

The defendants have maintained that the plaintiffs' state law claim for Tortious Interference is subject to official immunity under Texas state law, Official immunity under Texas law is similar to qualified immunity under federal law. *See Kellough v. Bertrand*, 22 F. Supp.2d 602, 609 (S.D. Tex. 1998) ("Texas law provides government employees official immunity from suits arising from the good faith performance of their discretionary duties where they are acting within the scope of their authority. While the Texas doctrine of official immunity is distinct from the federal doctrine of qualified immunity, the state doctrine differs in no ways that would provide an outcome in this case different than that provided by the federal doctrine.") (citations omitted). "To enjoy the benefit of official immunity [under Texas law] with respect to an action he is alleged to have taken, an officer must have been performing his discretionary duties in good faith while acting within the scope of his authority." *Id.*; *Wadewitz v. Montgomery*, 951 S.W.2d 464, 4650-66 (Tex. 1997).

The court concludes that the defendants are not entitled to official immunity. There is sufficient evidence in the record to conclude that the defendants were not acting in good faith when they chose to no longer send their officers to classes taught by the plaintiffs. No reasonable officer in the defendants' position could have thought that boycotting the

plaintiffs' business was justified by the fact that the plaintiffs exercised their First Amendment rights by testifying in a suit at least 430 miles away[7] from the Academy in which they taught.

The defendants have also maintained that the justification defense precludes the plaintiffs' claims for tortious interference. In order to establish this defense, the defendants must show that they (1) exercised their own legal rights, or (2) had a good faith claim to a colorable legal right, which ultimately proves to be mistaken. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). The defendants argue that they were exercising their own rights under the First Amendment by speaking out about their concerns of a conflict of interest. However, when all the evidence is construed in favor of the plaintiffs as it must at this stage of the litigation, it is clear that this defense is a question of fact for the jury to decide.

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7. The court takes judicial notice that the distance from Kilgore, Texas to Kerrville, Texas is approximately 438 miles. For comparison, the distance from where this court sits the majority of time in Beaumont, Texas to New Orleans, Louisiana is 261 miles. The distance from Kilgore to New Orleans is 404 miles. The distance from Boston, Massachusetts to Washington, D.C. is 446 miles. The distance from Columbus, Ohio to St. Louis, Missouri is 420 miles. This court fails to see how a police officer from Columbus, Ohio testifying in St. Louis could possibly be a conflict of interest. The same goes for an officer from Boston testifying in our nation's capitol.

C. The Municipal Defendants

Each of the plaintiffs' claims against the city and county defendants require the plaintiffs to establish that they were deprived of constitutional rights by the official policy or custom of the municipality. *See Monnell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1997). This can be done by pointing to the fact the individual defendants in this case are the policy makers of their respective municipalities. *See id.; Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). There is little doubt that the individual defendants are the policy makers of their respective municipalities. The individual defendants are all the heads of the defendant law enforcement agencies. The individual defendants are responsible for establishing policies in their departments absent a contrary mandate from a legislative body. In *Pembaur*, the Supreme Court held that municipalities are liable under § 1983 when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* The individual defendants in this case chose to no longer send their officers to classes taught by the plaintiffs. This deliberate choice established a municipal policy. Thus, the court concludes that the individual defendants were the policy makers for their respective departments and the municipal defendants are not entitled to summary judgment.

Appendix D

IV. CONCLUSION

Plaintiffs' evidence reflects a dogged determination by the defendants to rid Kilgore College of the plaintiffs as instructors in retaliation for speaking out about excessive force by police officers. The court concludes that the acts alleged in the complaint and found in the record, if proven at trial, would violate "clearly established" law. The court cannot tell at this stage of the case, where the evidence must be viewed in the light most favorable to the plaintiffs, whether the defendants acted in an objectively reasonable manner. Whether the plaintiffs can prove their allegations at trial given defendants' contrary evidence is another matter, left to be decided during a trial consistent with this opinion. For the foregoing reasons, the Defendants' Joint Motion for Summary Judgment is DENIED. Moreover, the defense of qualified immunity does not prevent this case from moving to trial.

Signed this 12th day of May, 2000.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE